Brown v. Quicken Loans

HERE'S PROOF THAT A MORTGAGOR WITH A TALENTED ATTORNEY CAN CRUSH A CROOKED MORTGAGE LENDER

10 July 2014 by Bob Hurt. 727 669 5511. http://bobhurt.com. Okay to distribute this freely.

The Beauty of Brown v Quicken Loans

The outcome of the Brown v Quicken Loans case gives hope to all mortgage victims and should embarrass all Foreclosure Pretense Defense Attorneys. This compilation shows the public and the legal community HOW TO BEAT THE ABUSIVE MORTGAGE LENDER and obtain a nearly ***$5 million judgment***. I challenge every Mortgagor to READ this e above-linked document COMPLETELY.

Excerpt from the law journal The West Virginia Record:

http://wvrecord.com/news/s-3962-state-supreme-court/261610-quicken-loans-ordered-to-pay-3-5m-in-mortgage-case-appeals

Quicken Loans ordered to pay $3.5M in mortgage case, appeals

August 7, 2013 9:00 AM
By JOHN O'BRIEN

WHEELING – A judgment in a fraud lawsuit against Quicken Loans has only gotten bigger since an appeal to the state Supreme Court, so the company is heading back.

On July 17, Quicken Loans filed a notice of appeal to the state Supreme Court of a decision in Lourie Jefferson's lawsuit against it that awarded her $3.5 million in punitive damages and more than $875,000 to attorneys at Bordas & Bordas in Wheeling.

In November, the Supreme Court found the company committed fraud and violated various provisions of the West Virginia Consumer Credit and Protection Act in a mortgage loan, but sent the case back to Ohio County Circuit Court to adjust an approximately $2.8 million award.

On June 18, Ohio Circuit Judge David J. Sims, who took over the case from Arthur Recht, awarded Jefferson even more. In an appeal brief, the company called the punitive damages award "grossly excessive."

See the West Virginia Supreme Court documents for Case # 11-0910 (First Appeal) and 13-0764 (Second Appeal) here:

http://www.courtswv.gov/searchPageResults.html?q=Quicken%20Brown

And download my pdf compilation in a single 18MB pdf file from here:

https://archive.org/details/BrownVQuickenLoansOverviewAndCaseFiles

Hats off to Jim Bordas and Jason Causey of Bordas & Bordas Law firm, Wheeling WV, for engineering the defeat of Quicken Loans and using the LAW to bludgeon them into submission. I expect the final opinion in Quicken's second appeal from the WV Supreme Court soon.

The Key to Winning - Attack the Mortgage, NOT the Foreclosure.

How did the Bordas team win? They examined the mortgage and discovered a horror story of criminal and civil abuses by lender Quicken Loans. Quicken made the loan so toxic they could not sell or securitize it.

Quicken refused to offer Brown a reasonable settlement, so Bordas sued, and won a whopping $2+ million judgment. Quicken appealed, the Supreme Court of WV remanded, the trial court upped the judgment to nearly $5 million. Quicken appealed again, and the Supreme Court of WV will soon end the case with a final opinion against Quicken.

What lesson shall we learn from this? Just this... If you face foreclosure, you need a comprehensive mortgage examination to prove the causes of action against the lender, and you need a lawyer willing and able to attack the mortgage, not merely defend against the foreclosure.

If your lawyer will not seek and find the causes of action underlying your mortgage and then attack the lender on that basis, you need to FIRE that attorney. Do not rest until you have found a competent litigation team like that at Bordas & Bordas.

Legal Malpractice Lawsuit Opportunities for Foreclosure Victims

What if you have already lost your home to foreclosure AND your lawyer FAILED to seek and find causes of action and failed to attack on that basis? You might have a valid legal malpractice claim against that attorney. You would show wisdom by hiring a competent professional to examine your mortgage. If the examination report shows that

your lawyer could have beaten the lender with affirmative defenses and counter/cross complaints, or a tort/breach lawsuit, you might have a legal malpractice cause of action against your attorney. Call me at 727 669 5511 to discuss the related concept of a "case within a case."

Step-by-Step Plan for Coming Out Ahead

In order to save your home from foreclosure, or become able to negotiate a cram-down of the loan balance (and other favorable terms), or to sue the lender for injuring you, you must do one thing first:

1. HIRE A COMPETENT MORTGAGE EXAMINER OR ATTORNEY to examine your mortgage and find all the causes of action.
   a. Of course, a good mortgage examiner will charge you a fraction of what the lawyer will charge, IF you can find an examiner or lawyer with the requisite competence. Which worries me. Which is why I have gone to the trouble of writing this message.
   b. Read http://MortgageAttack.com then call 727 669 5511 for more info. I know the only competent professional mortgage examination firm in America.
2. If the examination report reveals causes of action (torts, breaches, legal errors) against the lender or lender's agents (title company, mortgage broker, appraiser, servicer)...
   a. Notify the servicer and then attempt to negotiate a settlement. I suggest finding a "CLOSER" type of lawyer to negotiate for you. I suggest a "loan mod" type of settlement where the lender lowers the balance to the present market value, gives a favorable fixed interest rate, sets the term for 30 years, no prepayment penalty, assumable, no balloon, forgive arrears and legal fees/costs. If this fails...
   b. Sue via complaint, counter complaint, cross complaint as necessary. I suggest hiring a COMPETENT lawyer (not a foreclosure pretender defender) for this purpose. If possible, find one to take your case on contingency. The lawyer will use the causes of action from the mortgage examination report to formulate the pleading.
   c. Go to next step if you have no money or no causes of action.
3. DO NOT let your home go to foreclosure final judgment. If you do, it will haunt your credit record for 10 years AND (depending on your state) leave you owing a huge deficiency judgment when the auction does not bring enough money to discharge your debt. Instead, try to work with the lender to do one of these:
   a. **Short-Sale**: Bank agrees that you may sell the house at a discounted price in order to end the foreclosure, and hand over all the proceeds from

the sale to the bank. This imposes some work and stress on you, but if you have equity in the house (it has higher resale value than you owe on the mortgage note), this should be your first choice

b. **Keys-for-Cash**: Bank pays you cash ($2,000 to $20,000, depending on the value of the home) to move out, leave the home broom clean, and deed the property to the bank. This can save a huge litigation cost for the bank, and make leaving the property less stressful for you. Sometimes a mortgage examination can reveal weak causes of action that can pressure the bank to give you a Keys-for-Cash deal.

c. **Deed-in-Lieu-of-Foreclosure**: Same as Keys-for-Cash, except the bank gives you no cash.

Take the Right Action - Contact Me NOW

Okay, I have given you the proof that you can beat your abusive lender, and I have shown you the strategic plan for doing so. If you simply refuse to do what I have outlined above, then you will either lose your home to foreclosure, or make underwater loan payments. If you feel READY engage in MORTGAGE ATTACK, contact me immediately for help.

If you do not need help, SOMEBODY you know DOES. Pass on this message and encourage your friends, associates, family members, loved ones to call me or write me for help. Send them to http://MortgageAttack.com for an education on the issues.

No, I have no authorization to practice law or give legal advice, so I refrain from both. However, we can discuss the strategic business aspects of your situation as necessary.

Yes, if you fit into the category of "Foreclosure Pretender Defender," you can contact me too, and I shall help you the best I can. Whether you believe it or not, training for “Kool-Aid” drinkers like you has become available. Sorry, no CLE credits.

AND... I do not charge money for giving business guidance. So, what do you have to lose? Give me a call.

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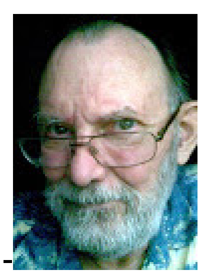

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11-0910

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

LOURIE BROWN and
MONIQUE BROWN,

Plaintiffs,

2011 FEB 17 PM 1 49

vs. Civil Action No. 08-C-36

BRENDA L. MILLER

QUICKEN LOANS, INC.,
APPRAISALS UNLIMITED,
INCORPORATED, DEWEY V. GUIDA and
JOHN DOE NOTE HOLDER,

Defendants.

MEMORANDUM OF OPINION AND ORDER
(ATTORNEY FEES/PUNITIVE DAMAGES)

Following the publication of the Memorandum of Opinion and Order containing the Findings of Fact and Conclusions of Law relating to the liability issues in this matter, this Court next addressed the matters relating to attorney fees and punitive damages.[1]

ATTORNEY FEES

West Virginia Code §46A-5-104 provides:

> In any claim brought under this chapter applying to illegal, fraudulent of unconscionable conduct or any prohibited debt collection practice, the court (may) award all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer. ...[2]

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[1]Both issues needed to be addressed separately based upon item VII(punitive damages) and item VIII(attorney fees and costs) as contained in the Conclusions of Law in the Memorandum of Opinion and Order published on February 25, 2010.

[2]The facts and circumstances of this case squarely comes within the boundaries of the West Virginia Consumer Protection Act which is recognized as a comprehensive attempt to extend protection to the consumer and persons who obtain credit in this State and who constitute the vast majority of it's adult citizens. See *Harless v. First National Bank*, 162 W. Va. 116, 125, 256 S.E.2d 270, 275-276 (1978)

This Court recognizes that the award of attorney fees is discretionary, however, there is no hesitancy in the opinion of this Court in awarding those fees based upon the Findings of Fact contained in the Memorandum of Opinion and Order which are hereby incorporated by reference *in haec verba*. Therefore the only issue to be determined is the amount of attorney fees and costs.

The overriding findings of this Court is that this case was one of the more confusing, confounding and complex cases both factually and legally that has ever been before this Court. It is within that prism that the issue of attorney fees is examined.

This Court has reviewed the claim for attorney fees within the context of *Aetna Casualty and Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Syllabus point 4 of *Pitrolo* provides:

> Where's attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Applying each of the *Pitrolo* factors in this case leads to accepting the billing records submitted by the Law Firm of Bordas and Bordas as being both reasonable and reliable in terms of the work performed and the time devoted to each of those tasks. The only difference is the hourly rate which this Court does not accept as being reasonable under the circumstances and instead would allow James G. Bordas, Jr. an hourly rate of Four Hundred Dollars; Jason E.

Causey an hourly rate of Two Hundred and Fifty Dollars; and the other attorneys and staff an hourly rate of One Hundred and Seventy-Five Dollars. With these modification the award for attorney fees and costs are as follows:

James G. Bordas, Jr.	$178,100.00
Jason E. Causey	262,687.50
Other attorneys & staff	55,168.75
Lodestar Total	$495,956.25

The Plaintiff requests a contingency enhancement to augment the actual attorney fees. While this Court recognizes that a contingency enhancement may be permissible in West Virginia under Fee-Shifting Statutes such as the Consumer Credit Protection Act, this Court does not believe that under the circumstances that to permit an enhancement would fall within the permissible guidelines outlined by the West Virginia Supreme Court in *Heldreth v. Rahimian*, 216 W. Va. 462, 473, 637 S.E.2d 359, 370 (2006), that directs a Trial Court in determining attorney fees to apply the standard of "the overarching concern for the Trial Court is that the fees awarded must be reasonable". It is the view of this Court that the attorney fees which are outlined above are reasonable under the circumstances without a contingency enhancement.

PUNITIVE DAMAGES

The opinion published on February 25, 2010, made the determination that *a* punitive damage award was supported by those findings.[3] It is now the responsibility of this Court to determine *the* amount of punitive damage using the standards specified in Syllabus Point 3 of

[3]Each of the Findings of Fact in the liability are incorporated by reference herein *in haec verba*.

Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S. E. 2d 897 (1991). See *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E. 2d 122 (1996).

Taking all of the *Garnes* factors into consideration, including applying a factor of three times the compensatory damages and attorney fees, is $2,168,868.75.

This Court believes that this amount fairly applies the five standards in *Garnes* including the financial position of the defendant and as a matter of fundamental fairness, assuring that the punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees.

Accordingly, judgement is hereby awarded as follows:

ATTORNEYS FEES AND COSTS:	$495,956.25
EXPENSES:	100,243.64
TOTAL:	$596,199.89
PUNITIVE DAMAGES	$2,168,868.75

The objections of each party are hereby preserved.

IT IS SO ORDERED.

The Clerk of the Circuit Court of Ohio County is to provide an attested copy of this Order to James G. Bordas, Jr., Esquire, Jason E. Causey, Esquire, Richard W. Gallagher, Esquire, Stephen W. King, Esquire, and James P. Feeney, Esquire.

ENTER this 17th day of February 2011.

ARTHUR M. RECHT, JUDGE

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

LOURIE BROWN and
MONIQUE BROWN,

Plaintiffs,

RECEIVED

MAY 04 2011

v.

Civil Action No. 08-C-36

QUICKEN LOANS INC.,
APPRAISALS UNLIMITED
INCORPORATED, DEWEY V. GUIDA and
JOHN DOE NOTE HOLDER,

Defendants.

MEMORANDUM OF OPINION AND ORDER

This Court has reviewed all of the post-trial motions filed by the defendants regarding the above-captioned mater and finds no errors of law or fact, accordingly, *post-trial motions are hereby* ***denied.***

It is so **ORDERED.**

Entered this 2nd day of May, 2011.

ARTHUR M. RECHT, JUDGE

copies mailed to:

James G. Bordas, Jr., Esquire
Jason E. Causey, Esquire
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003

No. 11-0910

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and **MONIQUE BROWN,**

Plaintiffs below,

Respondents

(From the Circuit Court of Ohio County, No. 08-C-36)

BRIEF OF PETITIONER QUICKEN LOANS, INC.

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that the loan to Plaintiffs was unconscionable, given its failure to address substantive unconscionability and the loan's inarguable benefits to Plaintiffs, including lower monthly payments, a reduced interest rate, and a cash payout of over $40,000.

2. The Circuit Court erred in finding that Plaintiffs proved fraud by clear and convincing evidence, when the only evidence was one plaintiff's uncorroborated, self-serving, and vague testimony, and there was no evidence at all of falsity or fraudulent intent.

3. The Circuit Court was without authority to void Plaintiffs' obligation to repay the principal of the loan.

4. To the extent any cause of action permitting punitive damages survives review, the award of over $2 million in such damages – in a case with actual damages of less than $18,000 – was error because the Circuit Court: (a) failed to apply the required factors under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991); and (b) improperly and unconstitutionally inflated the award by adding attorney's fees and the principal of the loan to the "compensatory damages" amount it used as a multiplier in calculating the award.

5. The Circuit Court erred in failing to offset the award against Quicken Loans with the settlement amount paid to Plaintiffs by another defendant.

STATEMENT OF THE CASE

This case arises from a debt consolidation and refinancing loan made by Defendant Quicken Loans, Inc. ("Quicken Loans") to Plaintiff Lourie Brown Jefferson ("Mrs. Jefferson") in the amount of $144,800. The loan (the "Loan") provided Mrs. Jefferson a payoff of pre-existing debts totaling $95,441.51, along with a cash payout of $40,768.78, while reducing her monthly payments by $316 per month and lowering her interest rates. Mrs. Jefferson made only two of

the reduced monthly payments before going into default, then — when Quicken Loans pressed for further repayment — she and her daughter filed this lawsuit. After a bench trial, the Circuit Court not only invalidated the loan, but allowed Mrs. Jefferson to keep the recently advanced $144,800 principal amount, and awarded Plaintiffs $2,782,545.36 (of which all but $17,476.72 consisted of punitive damages and attorney's fees).

In arriving at this remarkable result, the Circuit Court failed to weigh the benefits of the loan to Plaintiffs before finding it unconscionable; failed to find the required elements of Plaintiffs' fraud claim; failed to identify a legal basis for cancelling the entire loan, including the principal; failed to explain why it imposed over $2.1 million in punitive damages on a $17,476.72 restitution award; and failed to consider offsetting Quicken Loans' liability with the amount of a settlement paid by a former defendant. In sum, the Circuit Court awarded Mrs. Jefferson an enormous windfall as a reward for failing to make monthly payments that had actually been reduced by Quicken Loans in Plaintiffs' fourth home loan refinancing.

A. Background

Mrs. Jefferson and Lena Brown, Mrs. Jefferson's mother, purchased the subject property, located at 118 12th Street in Wheeling (the "Property"), for approximately $35,000 in 1988. *See* Findings of Fact and Conclusions of Law entered Feb. 25, 2010 ("2/25/10 Op.") at 3 (A128).[1] On December 3, 1993, they deeded the Property to Plaintiff Monique Brown in exchange for Monique Brown paying off the then-existing loan, and Monique Brown remained the sole owner of the Property until June 2006. *See id.* at 4 (A129).

In 2003, Mrs. Jefferson began using the Property as security for loans. On August 2, 2003, Mrs. Jefferson borrowed $40,518 from CitiFinancial, using the Property as collateral. *See*

[1] Appendix pages are designated as "A__."

Quicken Loans Exhibit ("QL Ex.") 91 (A1302-45). Just four months later, on January 8, 2004, Mrs. Jefferson refinanced with CitiFinancial for $63,961. *See id.* On May 31, 2005, Mrs. Jefferson refinanced the Property for yet a third time with CitiFinancial for $67,348, at an interest rate of 9.75%. *See id.* Mrs. Jefferson also had other debts, not all of them secured. In November 2005, December 2005, January 2006, and April 2006, she took four separate, unsecured loans with CitiFinancial for $1,500, $3,060, $5,000, and $7,650 — a total of more than $17,000. Because they were unsecured, the interest rates on these debts were far higher than for her mortgage, ranging from 24.99% to 31.00%. *See id.* Finally, on February 1, 2006, Mrs. Jefferson obtained a $3,418 income tax Refund Anticipation Loan from Jackson Hewitt, at a staggering interest rate of 94.862%. *See* 2/25/10 Op. at 5 (A130). In short, from 2003 to 2006, Mrs. Jefferson secured nine loans from three different sources, much of it at extremely unfavorable interest rates.

B. Mrs. Jefferson Seeks Another Refinancing of the Property, and Begins Contact with Quicken Loans

In the spring of 2006, Mrs. Jefferson filled out an on-line application seeking to obtain another refinancing, and she began receiving calls from numerous prospective lenders, including Quicken Loans. *See* Testimony of Lourie Jefferson, Vol. II, p. 191 (A921); Testimony of Anthony Nuckolls, Vol. IV, pp. 111-113 (A1078-79).[2]

Mrs. Jefferson and Quicken Loans first spoke on the telephone on May 15, 2006, and the next day, she completed the Client Information Summary as part of the loan origination process. *See* QL Ex. 64 (A1295). Along with providing personal information, Mrs. Jefferson represented

[2] Ms. Jefferson's daughter, Monique Brown, executed a Power of Attorney appointing Ms. Jefferson with the authority to pledge the Property and use the loan proceeds in her discretion. QL Ex. 46. Monique Brown's involvement in this case stems solely from her partial ownership of the Property.

to Quicken Loans that the "Anticipated Property Value" was $250,000. *See id.*; Testimony of Anthony Nuckolls, Vol. IV, pp. 138-39 (A1085).

On May 23, 2006, Quicken Loans requested that TSI Appraisal Services ("TSI") arrange for a full appraisal on the Property. *See* Testimony of Michael Lyon, Vol. IV, pp. 219-222 (A1105-06). TSI is a vendor that handles the ordering of appraisals for many lenders across the country. *See id.* at 218 (A1105). TSI uploaded an appraisal request, which was accepted by former co-defendants Appraisals Unlimited, Inc., and Dewey Guida, and on May 26, 2006, Mr. Guida opined that the Property had a value of $181,700. *See* Plaintiffs' Ex. 1DD (A1536). Quicken Loans also ordered and reviewed Plaintiffs' Insurance Declaration Page, which showed that the Property was insured for $328,000. *See* Testimony of Michael Lyon, Vol. IV, pp. 229-230 (A1108); QL Ex. 26 (A1294). Quicken Loans reviewed and accepted the appraisal. *See* Testimony of Michael Lyon, Vol. IV, p. 292 (A1123).

In anticipation that the loan would ultimately close, Mrs. Jefferson — who had applied for a loan that would provide significant cash beyond what she needed to pay off her existing loans — deposited $500 for a new Toyota Avalon on June 17, 2006. The purchase price for this automobile was approximately $38,000. *See* Testimony of Lourie Jefferson, Vol. II, p. 228 (A958). In June 2006, Mrs. Jefferson became delinquent on her existing CitiFinancial mortgage. *See* Testimony of Michael Lyon, Vol. V, pp. 5-15 (A1137-39). Because she became a greater credit risk, Quicken Loans offered her a loan package with higher up-front costs. *See id.*; *see also* Plaintiffs' Ex. 4 at Q2688 (A1860). Prior to closing, Quicken Loans delivered the package of loan documents to Mrs. Jefferson, *see* Plaintiffs' Ex. 5, at B5078 (A1981), but she did not open or read the documents until the day of the closing. *See* Testimony of Lourie Jefferson, Vol. II, p. 201 (A931).

C. The Terms of the Loan

On July 7, 2006, Mrs. Jefferson closed on the $144,800 loan. *See, e.g.*, QL Exs. 1, 4, 9-11, 13 (A1273-88). Under the terms of the loan, Mrs. Jefferson paid off pre-existing debts of $95,441.51, and walked away with $40,768.78 in cash. *See* QL Ex. 10 (A1276). In addition, by consolidating her unsecured credit card debt into the refinancing, Mrs. Jefferson received a reduced interest rate of 9.15%. *See* Testimony of Margot Saunders, Vol. II, p. 158 (A888). Her previous CitiFinancial loan had a rate of 9.75%, and two other loans that were consolidated into the Loan were at 12% and 23.99%. *See* QL Ex. 91 (A1302-45); Testimony of Morgan Winfree, Vol. IV, p. 49-51, 54 (A1063-64). Moreover, Mrs. Jefferson's new monthly payments were $1,144, considerably less than the $1,460 per month that she had previously been paying. *See* QL Ex. 11 (A1279); Testimony of Lourie Jefferson, Vol. II, pp. 227 (A957). These monthly savings were locked in for at least three years. *See* QL Exs. 13, 14 (A1284-93).

To reduce her monthly payment, the loan included a balloon feature. Although the term of the loan was thirty years, payments were amortized over 40 years, which resulted in an amount due at the end of the term. The balloon was described in detail in the loan documents provided to Mrs. Jefferson before closing, including the "3/6 Adjustable Rate/Balloon Mortgage Disclosure" (QL Ex. 4 (A1274)), the "Adjustable Rate Rider" (QL Ex. 13 (A1284)), and the "Adjustable Rate: Balloon Note" document (QL Ex. 14 (A1289)). At closing, Mrs. Jefferson saw the term "balloon payment" and had some "concern" about it, but decided to proceed and signed these documents. *See* Testimony of Lourie Jefferson, Vol. II, pp. 203-04 (A933-34).

D. Mrs. Jefferson Defaults on the Loan

Mrs. Jefferson left the closing with a check from Quicken Loans for $40,768.78. QL Ex. 10 (A1276). On July 18, 2006, she used $28,536.90 of that money to purchase a new Toyota Avalon. *See* Testimony of Lourie Jefferson, Vol. II, p. 228 (A958). She then used much of the

remainder of the payout to retire other existing debts. *See* Testimony of Lourie Jefferson, Vol. II, p. 229 (A959). Mrs. Jefferson made her first two monthly installment payments to Quicken Loans in September and October 2006. QL Ex. 92 (A1349).

The third payment was due on November 1, 2006; however, Quicken Loans did not receive this payment until it was more than 75 days overdue, on January 16, 2007. *See id.* (A1348). Then, on or about January 19, 2007, Mrs. Jefferson became ill. *See* Testimony of Lourie Jefferson, Vol. II, pp. 208-209 (A938-39). Mrs. Jefferson alleged that because of this illness "and the unaffordable monthly payment on the subject loan," she was unable to meet her financial obligations. *See* Complaint ¶ 29 (A22). Mrs. Jefferson made only one other payment on the Loan before the commencement of this lawsuit. *See* QL Ex. 92 (A1346-48).

E. Plaintiffs File Suit Against Quicken Loans and the Appraisal Parties

Following Plaintiffs' default on the Loan, and Quicken Loans' demand for payment, Plaintiffs filed the instant lawsuit, alleging various claims against Quicken Loans, including: (1) unconscionability (W. Va. Code § 46A-2-121); (2) breach of the covenant of good faith and fair dealing; (3) unfair and deceptive acts (W. Va. Code § 46A-6-104); (4) fraud; (5) illegal appraisal; and (6) illegal balloon note (W. Va. Code § 46A-2-105). Plaintiffs also brought claims against Appraisals Unlimited, Inc., and Dewey Guida; these claims were resolved in a settlement in or around May 2009.

In October 2009, the case was tried to the Circuit Court. Plaintiffs argued that former defendant Guida's appraisal overstated the value of the property, and that Quicken Loans performed an inadequate review of the appraisal. Mrs. Jefferson also testified that Quicken Loans' representative had told her that her poor credit score required a higher interest rate and she could refinance at a lower rate after several months of payments on the loan: "what they could do would be to refinance the loan in three to four months, and then that I could get it at a

cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got – everything started to be paid off, then I would be able to refinance my loan." Testimony of Lourie Jefferson, Vol. II, p. 195 (A925). This testimony was the only evidence of the alleged promise to refinance, and both sides agreed that Mrs. Jefferson made only two monthly payments before defaulting. *See* Testimony of Margot Saunders, Vol. II, p. 13 (A742); Testimony of Morgan Winfree, Vol. IV, p. 57 (A1065).

F. The Circuit Court Decisions

On February 25, 2010, the Circuit Court issued findings of fact and conclusions of law. The Circuit Court held that Plaintiffs prevailed on all of their claims against QL except for breach of the covenant of good faith and fair dealing. 2/25/10 Op. at 18 (A143).

Specifically, on the claim for unconscionability, the Circuit Court held that the Loan "product in and of itself was unconscionable." *Id.* In so ruling, the Circuit Court stated that "[t]he Quicken loan converted the $25,000 in unsecured debt to secured debt and raised her secured monthly debt obligation from $578 to $1,114; thus, putting the plaintiffs' home at risk." *Id.* The Circuit Court did not indicate how this differed from other common situations (such as second mortgages) in which homeowners increase their secured debt so as to borrow money at favorable rates, and did not address what Plaintiffs received in exchange for the increase in secured debt: a reduced interest rate, improvement of their monthly cash flow by over $300, and a cash payout of over $40,000.

On the fraud claim, the Circuit Court, relying entirely on Mrs. Jefferson's own uncorroborated testimony, found that there was clear and convincing evidence of a fraudulent promise by Quicken Loans to refinance the Loan within three to four months. *Id.* at 21 (A146). The court did not mention that, by Mrs. Jefferson's own account, the supposed promise was *contingent* on making her loan payments, or her default on making those payments. For good

measure, the Circuit Court also deemed fraudulent the mislabeling of a loan discount on the HUD Settlement Statement, and Quicken Loans' disclosure of the balloon payment feature in a manner that differed from West Virginia statutory requirements. *Id.* at 21-22 (A146-47).

On the other claims, the Circuit Court found a violation of the balloon disclosure statute because the Note itself did not state the amount of the balloon payment and its due date. *Id.* at 25 (A150). The Circuit Court also found a violation of the appraisal statute on the basis that the Loan "exceeds the fair market value of their property," *id.* at 23 (A148), and Quicken Loans "[n]egligently conduct[ed] the appraisal review," *id.* at 17 (A142). The final violation, for "Unfair and Deceptive Acts," was derivative of the other purported claims, *i.e.*, the alleged false statements regarding the loan discount, the alleged failure to properly disclose the balloon payment, and the supposedly negligent appraisal review. *Id.* at 20 (A145).

The Circuit Court awarded several forms of relief: (1) restitution in the amount of $17,476.72 for payments made to Quicken Loans; (2) cancellation of Mrs. Jefferson's obligation to repay any part of the Loan — even the $144,800 principal she had received — and an injunction against any attempt to collect payments on the loan; (3) attorney's fees and litigation costs; and (4) punitive damages. *See id.* at 18, 20, 22, 24, 25 (A143, 145, 147, 149, 150).

At the subsequent hearing on attorney's fees and punitive damages, Plaintiffs conceded that they had few contemporaneous time records, *see* Sept. 1, 2010 Hrg. Tr., pp. 47-48 (A2415), and instead proffered an after-the-fact reconstruction of the time purportedly devoted to the case. Nonetheless, the Circuit Court, on February 17, 2011, fully "accept[ed] the billing records submitted by the Law Firm of Bordas and Bordas as being both reasonable and reliable in terms of the work performed and the time devoted to each of those tasks," 2/17/11 Op. at 2 (A310), and awarded $495,956.25 in attorney's fees.

As for punitive damages, the Circuit Court allotted two sentences to explain its award of over $2 million. The court referred to "the standards specified in Syllabus Point 3 of *Garnes*," 2/17/11 Op. at 3-4 (A311-12), but did not describe these standards or how they applied to this case. Instead, it stated, in full:

> Taking all of the *Garnes* factors into consideration, including applying a factor of three times the compensatory damages and attorney fees, is $2,168,868.75. This Court believes that this amount fairly applies the five standards in *Garnes* including the financial position of the defendant and as a matter of fundamental fairness, assuring that the punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees.

Id. at 4 (A312). The court did not explain why it used a three-times multiplier or why it included attorney's fees and the value of the cancelled loan as compensatory damages to be so multiplied.

Quicken Loans moved to set aside the judgment in accordance with Rules 52 and 59 of the West Virginia Rules of Civil Procedure, challenging the Circuit Court's decision on both liability and damages. Quicken Loans also moved for an offset of the award based on the settlement of the claims against former defendants Appraisals Unlimited, Inc., and Dewey Guida. On May 2, 2011, the Circuit Court denied the motions without explanation. On June 1, 2011, Quicken Loans filed a timely Notice of Appeal in this Court.

<u>SUMMARY OF ARGUMENT</u>

In this case, the Circuit Court entered a $2.7 million judgment against Quicken Loans for lending Mrs. Jefferson $144,800 on lawful terms that reduced Mrs. Jefferson's existing interest rate and monthly debt payments, and that provided her with cash to buy a new car. There is no legal or factual basis for either the Circuit Court's principal findings of liability or for the draconian remedies it imposed.

To begin with, the Circuit Court found the Loan unconscionable without any basis for finding the Loan *substantively* unconscionable, as required by this Court's cases. The Circuit

Court noted that the Loan increased Mrs. Jefferson's secured debt, but that is a routine feature of countless refinancing and second mortgages. In return, Mrs. Jefferson received a payoff of pre-existing debts totaling $95,441.51, a cash payout of $40,768.78, a reduction in her monthly payments by $316 per month, and a lower interest rate. The increase in secured debt, absent usurious interest rates or some other extraordinary feature, cannot have made the loan so one-sided as to be unconscionable.

Second, the Circuit Court's finding of fraud rested heavily on Quicken Loans' supposed oral promise to refinance in the future *if* Mrs. Jefferson met specific requirements. Yet not only did she fail to meet those requirements, but Plaintiffs produced no evidence of Quicken Loans' allegedly fraudulent intent, and certainly not the clear and convincing evidence required for fraud. As for the Circuit Court's other bases for finding fraud – which involve the balloon payment and closing costs – the Court failed to find multiple required elements, and there is no evidence in the record to support the necessary findings.

In addition to these errors in finding liability, the Circuit Court made multiple errors in imposing a truly extraordinary set of remedies. As an initial matter, the Circuit Court erroneously freed Mrs. Jefferson from any obligation to return or repay the principal of the loan, in disregard of the express limits on cancellation of debts imposed by W. Va. Code §§ 46A-5-101(2) and 46A-5-105. The Circuit Court also imposed over $2 million in punitive damages without performing the *Garnes* analysis required by this Court. Moreover, the Circuit Court's $2 million punitive damages award is unconstitutionally excessive because Plaintiffs were awarded only $17,476.72 in damages that can properly be considered compensatory. The Circuit Court attempted to justify this greater-than-100-to-1 ratio of punitive to compensatory damages by treating attorney's fees and cancellation of the loan as "compensatory," but this approach is

impermissible. Indeed, fee-shifting and cancellation of principal are themselves punitive, and using them as a basis for *additional* punitive damages is excessive and improper.

Finally, the Circuit Court failed to offset the damages against Quicken Loans with the settlement against former defendant Dewey Guida. The offset was required as a matter of law, and the Circuit Court gave no explanation for its refusal to do so.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Quicken believes that this case should be set for argument under Rule 20 of the West Virginia Rules of Appellate Procedure because this case involves (1) issues of fundamental public importance, including whether a loan can be held unconscionable without considering the benefits of that loan to the debtor; (2) issues of first impression, over which courts in other jurisdictions have disagreed, regarding whether attorney's fees can be treated as compensatory damages in calculating punitive damages; and (3) an important constitutional issue as to whether a \$2.1 million punitive damage award on a \$17,476.72 restitution award violates due process.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE LOAN TO PLAINTIFFS WAS UNCONSCIONABLE.

The Circuit Court erred in finding that the Loan — which improved Mrs. Jefferson's interest rate and monthly payments, while providing her with cash to buy an expensive new car — was unconscionable.[3] In particular, the court failed to identify any basis on which the Loan could be said to be substantively unconscionable, as required by *Brown v. Genesis HealthCare Corp.*, --- S.E.2d ----, 2011 WL 2611327 (W. Va. S. Ct. June 29, 2011), and nothing in the record would support such a finding.

[3] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 4-7.

As this Court recently held, a contract term is unenforceable for unconscionability only "if it is both procedurally *and* substantively unconscionable." *Brown*, 2011 WL 2611327, at *-- (emphasis added). "The question of whether a bargain is unconscionable is a question of law." *Id.* at *--. Accordingly, the Circuit Court's decision on this issue should be reviewed *de novo*. *See, e.g., State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005). Moreover "[t]he burden of proving that a contract term is unconscionable rests with the party attacking the contract." *Brown*, 2011 WL 2611327, at *--. Plaintiffs failed to satisfy this burden.

The Loan was not substantively unconscionable because it provided clear and undisputed benefits to Plaintiffs, which the Circuit Court failed to weigh in deciding whether the loan was unfair to Plaintiffs.[4] "[S]ubstantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." *Brown*, 2011 WL 2611327, at *--. A bargain is unconscionable only when it is "so one sided as to lead to *absurd* results." *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 603, 346 S.E.2d 749, 752 (1986) (emphasis added; quotation marks omitted).

The Loan was not "one-sided," and it did not "lead to absurd results." Instead, it provided Mrs. Jefferson with what many consumers quite rationally want: a large cash payout, lower monthly payments, and a better interest rate. Mrs. Jefferson herself conceded that the loan helped her make ends meet. *See* Testimony of Lourie Jefferson, Vol. II, p. 228 (A958). And these savings were locked in for at least three years. *See* Testimony of Margot Saunders, Vol. II, p. 8 (A737); QL Exs. 13, 14 (A1284-93). Moreover, in exchange for consolidating her credit card debt into the mortgage, Mrs. Jefferson benefited from a significantly reduced interest rate of

[4] Quicken Loans also disputes the existence of procedural unconscionability, in that there was no evidence that Ms. Jefferson — who received calls from numerous prospective lenders, *see* Testimony of Lourie Jefferson, Vol. II, p. 191 (A921), and could have turned to others if Quicken Loans' terms were unreasonable — suffered from a lack of bargaining power in obtaining the Loan.

9.15%. *See* Testimony of Margot Saunders, Vol. II, p. 158 (A888). The CitiFinancial loan, by contrast, had a 9.75% interest rate, and two other loans which were consolidated into the Loan were at 23.99% and 12%. *See* Testimony of Morgan Winfree, Vol. IV, pp. 49-54 (A1063-64).

These undisputed benefits belie the idea that the loan was unconscionable. As Judge Copenhaver recently held, a loan is not unconscionable under West Virginia law where "plaintiffs have not alleged any reason why their previous mortgage loans would be more beneficial to them than the [new] loans, likely because the new interest rates compare favorably to the [prior] rates and the monthly payments were lower." *Croye v. GreenPoint Mortg. Funding, Inc.*, 740 F. Supp. 2d 788, 794 (S.D. W. Va. 2010). Likewise, here, the Loan provided clear benefits in a large cash payout, lower monthly payments, and a lower interest rate. Indeed, Plaintiffs' expert failed to cite any other lender that could have given Mrs. Jefferson these benefits on better terms. *See* Testimony of Margot Saunders, Vol. II, pp. 120-21 (A850-51). The Circuit Court did not weigh any of these benefits against the payment burdens on Plaintiffs, as would be necessary to establish that the loan was so one-sided as to be unconscionable. And any such weighing would show that the loan made good sense for someone who needed an immediate cash payout and wanted to reduce her monthly payments.

Instead of giving these benefits their due weight — or, indeed, any weight — the Circuit Court focused only on four factors that it contended made the loan unconscionable: (1) "The false promise of refinancing"; (2) "Introducing a balloon payment feature at closing" and "[f]ailing to properly disclose the balloon payment"; (3) "Falsely representing that the plaintiffs were buying the interest rate down"; and (4) "Negligently conducting the appraisal review." 2/25/10 Op. at 17 (A142).[5] But these factors concern only the *procedure* for making the loan.

[5] The Circuit Court also cited four supposedly "unconscionable terms" (2/25/10 Op. at 17 (A142)), three of which are duplicative of the four factors, *i.e.*, the discount and interest rate issue, the

None of the factors addresses the key issue of *substantive* unconscionability, which requires proof that the resulting bargain was so one-sided that the law cannot allow it. *See Brown*, 2011 WL 2611327, at *--. The Circuit Court should have asked whether, as a *matter of law*, a person may choose to receive the benefits of the Loan on the terms prescribed, or whether such a Loan is so one-sided as to be forbidden by law. The answer to that question should be self-evident.

In addition, each of the circumstances cited by the Circuit Court fails on its own terms:

First, Quicken Loans' supposed promise of a better deal through a future refinancing, even if it were made (which it was not) and broken (which it was not), would not render *this* loan unconscionable, because the loan's terms were not absurdly one-sided. In other words, the existence of a supposed promise outside the agreed-upon deal does not affect whether the deal itself is substantively unconscionable.

Second, although the form of the disclosure of the loan's balloon feature may not have strictly conformed to statute, it *was* disclosed (as discussed below). In any event, a failure to meet a statutory *disclosure* requirement does not render the entire loan substantively unconscionable. Moreover, balloon payments are a commonplace, perfectly legal feature in many home loans. Hence, the balloon itself cannot render the loan unconscionable. *See, e.g.*, *Mallory v. Mortgage Am.*, 67 F. Supp. 2d 601, 612-13 (S.D.W. Va. 1999) (plaintiffs failed to show that loan containing balloon payment was unconscionable).

Third, the trial record establishes that the amount of closing costs was reasonable because Mrs. Jefferson's credit rating placed her in a high-risk category. Mrs. Jefferson's recent

(continued...)

balloon payment issue, and the appraisal issue. The other one is that there were "excessive closing costs of $8,889" (*id.*), but the Circuit Court cited no evidence to support the idea that this amount on a loan of $144,800 is "excessive," and none was presented at trial. Moreover, at most, excessive closing fees could make *those fees* unconscionable; logically, they could not render the entire loan unconscionable.

delinquency on her existing CitiFinancial mortgage necessarily caused her to become a greater credit risk for Quicken Loans, and that greater risk required offering her a loan package with higher up-front costs. *See* Testimony of Michael Lyon, Vol. V, pp. 5-15 (A1137-39). Simply put, the charging of fees commensurate with the risk of a loan does not make the loan unconscionable. While the Circuit Court found that the higher costs at closing were inaccurately described in the HUD Settlement Statement, those higher costs would have been charged regardless. *See id.*; *see also* Plaintiffs' Ex. 4 at Q2688 (A1860). In any event, even if closing costs had been overcharged (and they were not), the law's remedy is a refund of that overcharge. *See* W.Va. Code § 46A-7-111. The entire loan is not *ipso facto* unconscionable.

Fourth, although it now appears that former defendant Guida's appraisal overstated the value of the property, inadequate collateral does not render a loan one-sided in favor of the *lender* – to the contrary, inadequate collateral greatly *disadvantages* a lender. Moreover, there is an entirely separate statute that deals with inflated appraisals, *see* W. Va. Code § 31-178(m)(8), and provides the appropriate remedies for a violation.

Finally, the Circuit Court stated that the Loan "converted the $25,000 in unsecured debt to secured debt and raised her secured monthly debt obligation from $578 to $1,114," and by "putting the plaintiffs' home at risk, . . . [t]he net effect of this conversion is unconscionable." 2/25/10 Op. at 18 (A143). However, the premise that increasing secured debt is *per se* unconscionable has no legal basis, and would call into doubt common situations (such as second mortgages) in which homeowners increase their secured debt to borrow money at favorable rates. Indeed, the court ignored the fact that Plaintiffs' *total* monthly debt obligation *decreased* from $1,460 to $1,114. *See* Testimony of Lourie Jefferson, Vol. II, pp. 227-228 (A957-58). This

substantial benefit to Plaintiffs – in addition to a reduced interest rate and a cash payout of over $40,000 – establishes that the Loan was not so one-sided as to be unconscionable.

II. THE CIRCUIT COURT ERRED IN FINDING THAT PLAINTIFFS PROVED FRAUD BY CLEAR AND CONVINCING EVIDENCE.

The elements of a common-law fraud claim are well established: "(1) that the act of fraud was committed by the defendant; (2) that it was material and false; (3) that plaintiff relied upon the misrepresentation and was justified in relying upon it; and (4) that plaintiff was damaged because he relied upon it." *Martin v. ERA Goodfellow Agency, Inc.*, 188 W. Va. 140, 142, 423 S.E.2d 379, 381 (1992). "These elements must be proved by clear and convincing evidence." *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992). The "clear and convincing standard" is "the highest possible standard of civil proof," which this Court has defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Moore v. Goode*, 180 W. Va. 78, 83-84, 375 S.E. 2d 549, 554-55 (1988) (quotation marks omitted). Plaintiffs fell far short of this stringent standard.[6]

A. There was no clear and convincing evidence of a promise to refinance, of the falsity of such a promise, or of Quicken Loans' fraudulent intent at the time of the supposed promise.

The Circuit Court found that Quicken Loans committed fraud primarily on the basis that Quicken Loans "[i]ntentionally promis[ed] Lourie Jefferson it would refinance her within 3 to 4 months from the date of the closing." 2/25/10 Op. at 21 (A146). This finding cannot be sustained. There is no clear and convincing evidence that such a promise was ever made. Moreover, by Mrs. Jefferson's own account, the alleged promise was contingent on her making

[6] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 8-11.

her loan payments for "three or four" months, and she defaulted after two months. Finally, there was no evidence that Quicken Loans knew that such a promise was false when it was made.

Plaintiffs' only evidence of the supposed promise to refinance the loan came from Mrs. Jefferson's own self-serving testimony that the promise was made. Specifically, she testified that she was told she could refinance if she improved her credit rating by making her loan payments: "[Quicken Loans' representative] told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got -- everything started to be paid off, then I would be able to refinance my loan." Testimony of Lourie Jefferson, Vol. II, p. 195 (A925).

This supposed promise did not appear in any written form, and Plaintiffs produced no evidence corroborating Mrs. Jefferson's testimony. Indeed, there was no documentation of any kind supporting this allegation, even though the record included numerous internal e-mails between Quicken Loans employees (*see* QL Exs. 74-83 (A1297-99)) and e-mails from Mrs. Jefferson herself to Quicken Loans (*see* Plaintiffs' Ex. 4 (A1741)). *See also* Testimony of Anthony Nuckolls, Vol. IV, pp. 101-102 (A1076).

Mrs. Jefferson's uncorroborated testimony does not meet the standard of clear and convincing evidence. This Court has held that a party's uncorroborated, sworn affidavit was insufficient even to satisfy the much lower standard of creating a dispute of material fact to survive summary judgment. *See Merrill v. Dep't of Health & Human Res.*, 219 W. Va. 151, 161, 632 S.E.2d 307, 317 (2006) ("In this case, [plaintiffs] have utterly failed to provide any supporting affidavits to corroborate their self-serving statements [which were made in sworn affidavits] . . . . Accordingly, they have not established the existence of a genuine issue of

material fact . . . ."); *see also Spaulding v. Spaulding*, 87 W. Va. 326, 104 S.E. 604, 606 (1920) (holding that where the only evidence is "the self-serving declaration" of one witness, then there is "no such clear and convincing evidence"). Indeed, if a self-serving statement alone could satisfy the "clear and convincing" standard, then that test would become meaningless. Anyone could claim fraud in contract negotiations, and if the factfinder credited his statement, then the contract would be set aside. Yet this facile means of "proving" fraud is precisely what the clear and convincing standard of proof is designed to prevent.

In addition, the Circuit Court erred as a matter of law in failing to explain its basis for accepting Mrs. Jefferson's self-serving assertions. "Where the determinative factor at trial is the credibility of the witnesses, this requires a trial court to specify what witnesses were not credited and why." *Brown*, 196 W. Va. at 570, 474 S.E.2d at 500. Here, the Circuit Court made no statement at all about the credibility of the witnesses, or why it accepted Mrs. Jefferson's version of the facts, all by itself, as *clear and convincing* evidence.

Furthermore, even if the promise had occurred, there is no evidence that the promise — as described by Mrs. Jefferson herself — was false, and no evidence that it was made with fraudulent intent. Where the claimed fraud is a breach of "a promise to be performed in the future," the plaintiff's proof must show that "the promisor, at the time of making the same, did not intend to keep" it. *Traders Bank v. Dils*, 226 W. Va. 691, 695, 704 S.E.2d 691, 695 (2010) (quotation marks omitted). Plaintiffs did not offer *any* evidence that Quicken Loans intended to refuse a refinancing even if Mrs. Jefferson had satisfied her end of the alleged bargain — which, of course, she did not.

In fact, the *only* evidence came from Quicken Loans, which established that. In if a client made timely payments, then a loan could be refinanced within four months. *See* Testimony of

Anthony Nuckolls, Vol. IV, p. 192-94 (A1098-99) ("Q. Under the right circumstances, could a client refinance a loan after the four-month period? A. Yes. Q. And what would they need to do, generally, to accomplish this? A. Generally, they would need to make timely payments, not delay payments subject to a judgment or collections, stay gainfully employed, just basic mortgage qualification things."). As discussed below, Mrs. Jefferson did not make timely payments for four months. Regardless, the point is that there is no evidence, let alone clear and convincing evidence, that if the promise had been made *and* if Mrs. Jefferson had made timely payments, Quicken Loans had no intention of honoring its supposed promise.

Indeed, the evidence does not even establish a breach of contract, let alone fraud, because Mrs. Jefferson breached the alleged bargain before Quicken Loans' "performance" was even required. She testified unequivocally that any promise by Quicken Loans was contingent on *her* making timely payments and improving her credit rating. According to Mrs. Jefferson, Quicken Loans promised that a refinancing would occur "in three to four months" once "everything started to be paid off," because "initially my credit scores weren't high enough." Testimony of Lourie Jefferson, Vol. II, p. 195 (A925).

This refinancing scenario never happened. Mrs. Jefferson did *not* make her loan payments for four months, as required under her own version of the supposed promise. She made just two timely payments, in September and October 2006. Thereafter, Mrs. Jefferson failed to make any additional payments until January 16, 2007 and February 5, 2007. *See* QL Ex. 92 (A1346-48). Her next payment arrived *thirteen months* later, on March 18, 2008, after this lawsuit had been filed. *Id.* In short, the key condition on which (according to her own testimony) the promise of refinancing was premised was never satisfied.

Finally, the promise, even if it existed, was far too vague for fraud. For a promise to give rise to fraud, it must "contain[] definitive and ascertainable terms." *Sayres v. Bauman*, 188 W.Va. 550, 554, 425 S.E.2d 226, 230 (W. Va. 1992). There was no specific date by which the refinancing would occur, let alone any specificity about the terms of the promise – including the amount of the new loan, the new interest rate, and the term of the new loan. Accordingly, even accepting Plaintiff's testimony, there was no enforceable promise.

B. There was no alternative basis for a fraud finding.

The Circuit Court's other theories of fraud are clearly deficient. The court posited that Quicken Loans committed fraud by "[n]ot disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment" and by "[r]epresenting to [her] that she was buying her interest rate down." 2/25/10 Op. at 21-22 (A146-47). Neither basis withstands scrutiny.

The balloon *was* indisputably disclosed, in several documents presented to Mrs. Jefferson, including the 3/6 Adjustable Rate/Balloon Mortgage Disclosure (QL Ex. 4 (A1274)), the Adjustable Rate Rider (QL Ex. 13 (A1284)), and the Adjustable Rate: Balloon Note document (QL Ex. 14 (A1289)), all of which Mrs. Jefferson signed. The Circuit Court found that these disclosures were insufficient to meet statutory criteria prescribed in W. Va. Code § 46A-2-105, *see* 2/25/10 Op. at 9-10 (A134-35), but the balloon was *in fact disclosed*, and Mrs. Jefferson was *actually* aware of it *before* she signed the note. These facts squarely negate the fundamental elements of fraud.

Mrs. Jefferson conceded that she received the loan packet containing the disclosures one to two days before the closing. *See* Testimony of Lourie Jefferson, Vol. II, p. 201 (A931). Then, at closing, she saw the term "balloon payment," had some "concern" about it, and decided to proceed nonetheless. *Id.* at 203 (A933). Indeed, Mrs. Jefferson signed two documents with the word "Balloon" in the *title*. *See* QL Exs. 4, 14 (A1274, 1289). Mrs. Jefferson's undisputed

awareness of the balloon payment feature prior to closing necessarily bars any fraud claim. *See Martin*, 423 S.E.2d at 380 ("If one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it, and cannot get relief against it."). There can be no fraud where the truth is disclosed, and the other party acts with knowledge of it.

Moreover, there is no proof at all of any fraudulent intent with respect to the balloon. Indeed, Quicken Loans' disclosure of the balloon feature in multiple documents is flatly inconsistent with an intent to defraud Mrs. Jefferson into believing there was no balloon feature. In addition, there is no evidence that Mrs. Jefferson relied on any supposed misrepresentation regarding the balloon payment. To the contrary, Mrs. Jefferson went ahead with the loan despite her knowledge and "concern" about the balloon. *See* Testimony of Lourie Jefferson, Vol. II, pp. 203-04 (A933-34). And again, the Circuit Court made *no finding* of reliance on this nonexistent misrepresentation. *See* 2/25/10 Op. at 21-22 (A146-47).

Finally, for the supposed fraud as to discount costs, there is also no evidence (let alone clear and convincing evidence) of reliance. The Circuit Court found that Quicken Loans "represent[ed] to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a 'loan discount' on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken Loans." *Id.* In short, the purported misrepresentation related only to the *purpose* of some of the closing costs, *i.e.*, the contention is that $2,100 of the closing costs should have been labeled differently. But the Circuit Court offered no explanation of why a changed *description* of the closing fees — which would not change the total amount of such fees — would have led Mrs. Jefferson not to execute the loan. And the exact amount of closing costs was conspicuously disclosed on the Settlement Statement and the Itemization of Amount Financed documents. *See* QL Exs. 9, 10 (A1275-76).

In any event, the Circuit Court made no finding at all as to the materiality of, or reliance on, the supposed $2,100 discrepancy in closing costs, and such a finding would be impossible because Mrs. Jefferson did not testify about reliance. Instead, her only testimony on the subject was that she did not know how much she was paying for discount points. *See* Testimony of Lourie Jefferson, Vol. II, pp. 202-03 (A932-33) ("Q. Were you told anything about, if you paid a little bit more money on this closing costs, that your interest rate would come down; you remember that? A. Something like that. Q. If you don't remember the word 'points' being used? A. No. Q. Do you know how much you paid in points? You have any idea? A. No."). Because of the high risk of the loan, Mrs. Jefferson would have had to pay the $2,100 at issue however it had been labeled in the Settlement Statement. *See* Testimony of Michael Lyon, Vol. V, pp. 12-15 (A1138-39); Plaintiffs' Ex. 4 at Q2688 (A1860). And there is nothing to support the idea that she would have walked away from the loan if the closing costs had been differently described. *See* Plaintiffs' Ex. 4 at Q2647, Q2650 (A1819, 1822) (internal Quicken Loans e-mails noting "[c]lient is very anxious to close" and Mrs. Jefferson "is on board to close this week . . . she understands the costs and rate are more and that she is now very high risk"). Thus, there was no clear and convincing evidence of materiality or reliance here.

III. THE CIRCUIT COURT LACKED THE LEGAL AUTHORITY TO FORGIVE THE PRINCIPAL OBLIGATION OF A SECURED DEBT.

A. There is no legal authority to forgive the obligation to repay principal here.

The Circuit Court erred as a matter of law in granting Plaintiffs the extraordinary and punitive remedy of voiding the Note and Deed of Trust and cancelling the obligation to repay even the *principal* amount of the loan. West Virginia law strictly limits the circumstances under which such windfall relief is permissible, and those circumstances are absent here. The Circuit

Court failed to cite any specific source for the legal authority it purported to exercise, and failed to explain how it could ignore the plain terms of the applicable statutes.[7]

Under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), there are only two circumstances in which cancellation of debt is a permissible remedy. First, cancellation of a debt is allowed for "regulated consumer loans." W. Va. Code §§ 46A-5-101(2). Here, because the interest rate was below eighteen percent, the loan at issue is not a "regulated consumer loan." *Id.* § 46A-1-102(38). Second, cancellation is permissible for "willful" violations of the WVCCPA, but *only* where "the debt is not secured by a security interest." *Id.* § 46A-5-105. Here, even if there had been willful violations – and there were not – the debt was undeniably "secured by a security interest."

Cancellation of the debt is not a permissible remedy for a violation that does not meet these narrow statutory conditions. This Court considered the issue in a case where debtors alleged that a lender "sold [them] credit life and property insurance without affording them the opportunity to buy insurance elsewhere in violation of W. Va. Code § 46A-3-109(2) . . . ." *Tomchin Furniture Co. v. Lester*, 172 W. Va. 575, 580, 309 S.E.2d 73, 78 (1983). While recognizing that such a violation could give rise to "an action for damages or an offset to their debt," the Court rejected the idea that it could cancel the debt, holding that "we are not aware of any decision that holds that such a claim defeats the creditor's right to repossess the property." *Id.* This Court explained that W. Va. Code § 46A-5-101 "provid[es] for civil liabilities and criminal penalties" under the WVCCPA, and "[t]here is no provision for cancellation of the security agreement." *Id.* Indeed, but for the narrow circumstances discussed above, the statute

[7] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 13-15.

expressly rejects cancellation, stating that "'[e]xcept as otherwise provided, a violation of this chapter does not impair rights on a debt.'" *Id.* (quoting W. Va. Code § 46A-5-101(5)).

Notwithstanding the strict statutory requirements for cancellation of debt, the Circuit Court held that it could cancel the principal based on unconscionability, appraisal, unfair practices, and fraud. However, none of these supposed violations supports this remedy, let alone overrides the clear statutory restrictions discussed above.

1. Unconscionability

First, the Circuit Court held that unconscionability under § 46A-2-121 was sufficient to cancel Mrs. Jefferson's debt, but § 46A-2-121 does not mention the possibility of cancellation at all. Indeed, "damages for fraud or unconscionable conduct [under the WVCCPA] are limited to actual damages and, if the court so determines, a penalty of not less than one hundred nor more than one thousand dollars." *One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W. Va. 687, 692, 425 S.E.2d 829, 834 (1992). While the statute provides that a court may "refuse to enforce" an unconscionable agreement, *see* W. Va. Code § 46A-2-121, an unenforced agreement removes benefits and obligations of *both* parties. It would be one thing to unwind the loan and put Plaintiffs in the position they would have been in had there been no loan, but it is quite another to cancel Plaintiffs' obligations while leaving them in possession of the loan proceeds.

Moreover, any interpretation of § 46A-2-121 that would permit forgiveness of the principal of a loan cannot be reconciled with the other provisions of the WVCCPA. As Judge Copenhaver has accurately observed, "[t]he power of the court to render a provision unenforceable under § 46A-2-121 should be construed *in pari materia* with the remedial sections of Article 5 pertaining to unconscionable, fraudulent and illegal acts." *Byrd v. Option One Mortgage Corporation*, No. 2:04-cv-01058 (S.D.W. Va., April 12, 2007), slip op. at 22. Indeed, Article 5 specifically mentions a cancellation remedy for "unconscionable conduct," and limits

that remedy to "willful[]" violations where "the debt is not secured by a security interest." W. Va. Code § 46A-5-105. This provision "would be superfluous" if "§ 46A-2-121 authorized the courts not only to declare an agreement unenforceable but also to declare that the consumer had no obligation to tender back the goods or funds that were subject to that agreement." *Byrd*, slip op. at 23. Finally, as discussed *infra* Part IV, cancellation of the debt is punitive, and "punitive damages are not available under the fraud or unconscionable conduct provisions of [§§] 46A-2-121 . . . and 46A-2-102(5)." *One Valley Bank*, 188 W. Va. at 692, 425 S.E.2d at 832.

2. Appraisal Statute Violation

Likewise, a forfeiture remedy cannot rest on the Circuit Court's finding of a violation of the appraisal statute, W. Va. Code § 31-17-17(a). *See* 2/25/10 Op. at 24 (A149). First, that section applies only to a "willful" violation of the appraisal statute. W. Va. Code § 31-17-17(a). The Circuit Court's *own findings* make clear that the appraisal violation was merely a negligent violation. 2/25/10 Op. at 15 (A140) ("The negligently performed appraisal review facilitated the sale of this loan . . . ."); *id.* at 17 (A142) ("[T]he loan was induced by unconscionable conduct due to . . . Negligently conducting the appraisal review and failing to realize the highly inflated appraisal from Guida."); *id.* at 20 (A145) ("[T]he defendant engaged in unfair methods of competition and unfair or deceptive acts or practices in the following manners: . . . Conducting a negligent appraisal review . . . ."). In making these repeated findings, the Circuit Court did not once use the word "willful." Indeed, at a later hearing, the Circuit Court stated:

> There were all errors and omission and commission caused misleading and distorted report, and then the misleading appraisal, which was negligent - I mean, all that really takes in the whole question of the appraisal. It was, basically, a finding of negligence. . . . But all of that was really on the basis of pure negligence and, rather than a finding of willful, wanton disregard.

Sept. 1, 2010, Hearing Transcript, Hon. Arthur Recht, pp. 117-118 (A2433).

Lastly, even if there had been a willful violation, and § 31-17-17(a) applied here, it would provide only for the loan to be "canceled." As shown above in the similar context of § 46A-2-121, such a remedy means only the parties should be returned to the *status quo ante*. It does *not* mean that Plaintiffs can cancel their obligations while retaining the loan proceeds as a windfall.

3. Unfair Practices

The finding of a statutory "unfair practices" violation also provides no legal basis for a punitive forfeiture. Again, the statute concerning such violations does not mention forfeiture or cancellation of a loan; instead, it provides for "actual damages or two hundred dollars, whichever is greater" and "such equitable relief as [the court] deems necessary or proper." W. Va. Code § 46A-6-106. A forfeiture cannot represent "actual damages," since keeping the principal is simply a windfall for Mrs. Jefferson.

Also, the forfeiture is not permissible as "equitable relief." Cancellation of loan principal is a distinct remedy governed by a particular statutory provision, W. Va. Code § 46A-5-105. The general authorization of equitable relief in Article 6 (which governs sales and leases) cannot override the plain language of the WVCCPA that is specifically applicable to secured loans. Instead, as with unconscionability, the statutes must be read *in pari materia*, so that cancellation of the principal is limited to willful violations and unsecured debt. *See Byrd*, slip op. at 22.

In any event, forfeiture simply is not an *equitable* remedy. *See, e.g.*, *Fraley v. Family Dollar Stores of Marlinton, West Virginia, Inc.*, 188 W. Va. 35, 38, 422 S.E.2d 512, 515 (1992) ("It is an elementary principle of equity jurisprudence that equity looks with disfavor upon forfeitures, and that equity never enforces a penalty or forfeiture if such can be avoided.") (quotation marks omitted). *Cf. Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 850 (N.D.W. Va. 2004) ("Although there is a provision in the WVCCPA giving courts discretion to award broad 'equitable relief,' that language does not support a finding that punitive damages are

available. As noted in *Haynes* [*v. Rhone-Poulenc, Inc*., 206 W. Va. 18, 521 S.E.2d 331 (1999)], punitive damages are a legal, not equitable, remedy.").

Finally, an equitable remedy for a violation premised on a misrepresentation about closing costs must necessarily be limited to the closing costs themselves; it cannot properly be leveraged into a basis for forfeiture of the entire loan amount.

4. Fraud

The Circuit Court also purported to impose a forfeiture of principal as a remedy for fraud. However, just as for unconscionability, the remedy for fraud in connection with a loan is defined by statute and restricted to non-secured debt. *See* W. Va. Code § 46A-5-105 ("If a creditor has willfully violated the provisions of this chapter applying to illegal, *fraudulent* or unconscionable conduct or any prohibited debt collection practice, . . . the court may cancel the debt when the debt is not secured by a security interest.") (emphasis added). Furthermore, it is black-letter law that a party seeking to void a contract based on fraudulent misrepresentation must return any benefit received under the contract – here the $144,800 in principal that Quicken Loans paid to Plaintiffs on July 7, 2006. *See Nat'l Life Ins. Co. v. Hanna*, 122 W. Va. 36, 7 S.E.2d 52, 53-54 (1940) (where "the plaintiff seeks to cancel, on the ground of fraudulent representations," an insurance contract, he is "required to refund the premiums received on that policy" because "any person demanding the rescission of a contract . . . must restore or offer to restore to the other party whatever he may have received under the contract") (internal quotation marks omitted); *see also* Restatement (Second) of Contracts § 384 (party seeking restitution must "return[] or offer[] to return, conditional on restitution, any interest in property that he has received").

B. Forfeiture of the principal of the loan is plainly unjust in this case.

As discussed above, the Circuit Court had no equitable authority to order forfeiture of the principal of the loan, and the Court Circuit did not even purport to apply its equitable authority

here. In any event, the forfeiture here is fundamentally unjust. Equity does not bestow gratuitous windfalls, and there can be no doubt that forfeiting the principal is a windfall for Mrs. Jefferson. She received $144,800 from Quicken Loans that she no longer has to pay back. Even if some of the terms of the loan were improper, there would be no rationale whereby equity would bestow all of the benefit of that loan upon her, with no reciprocal obligation at all.

Equity does equity, and there is no basis for depriving Quicken Loans of the full value of the property for making a loan with lawful, agreed-upon terms. To the extent that the appraisal was incorrect or the balloon payment was not properly disclosed, remedies could be fashioned to fully address and cure those violations. But the extreme remedy of forcing Quicken Loans to forfeit all of the money that it gave to Mrs. Jefferson has no connection to the alleged violations; it is a baldly punitive measure grossly disproportionate to any actual harm in this case.

IV. THE PUNITIVE DAMAGES AWARD WAS UNSUPPORTED BY ANY VALID CLAIM, AND IN ANY EVENT THE AWARD WAS GROSSLY EXCESSIVE AND DEPRIVED QUICKEN LOANS OF DUE PROCESS.

The Circuit Court's award of punitive damages is subject to *de novo* review. *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003). Here, the Circuit Court erred in three fatal respects. First, there is no valid claim on which punitive damages can be awarded. Second, the Circuit Court failed to apply the required factors in deciding punitive damages, outlined in *Garnes*, instead simply choosing a number with essentially no analysis. And third, it grossly inflated the compensatory/punitive multiplier by improperly treating as "compensatory" $740,000 in forgiven loan principal, attorneys' fees, and expenses – thereby turning a $17,476.72 restitution award into an ostensible basis for over $2 million in punitive damages.[8]

[8] These issues were presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 15-24.

A. The Circuit Court erred in awarding punitive damages because only the unsupported fraud claim supported punitive damages.

It is well-established that "the right to recover punitive damages in any case is not the cause of action itself, but a mere incident thereto." *Lyon v. Grasselli Chemical Co.*, 106 W. Va. 518, 521, 146 S.E. 57, 58 (1928). Thus, for Plaintiffs to recover punitive damages, there must be a viable underlying claim that could support such an award, and there is no such claim here.

None of Plaintiffs' statutory claims permit punitive damages. Quicken Loans' liability was premised on four statutory claims: (1) Unconscionability (§ 46A-2-121); (2) Illegal Balloon Note (§ 46A-2-105); (3) Unfair and Deceptive Acts (§ 46A-6-104), and (4) Illegal Appraisal (§ 31-17-8(m)(8)). Each statute provides an exclusive remedy. The Unconscionability and Illegal Balloon Note claims arise under Article 2 of the WVCCPA, and this Court has held that because Article 2 specifically sets forth the damages available to an aggrieved plaintiff, "punitive damages are not available." Syl. pt. 4, *Bolen*, 188 W. Va. 687, 425 S.E.2d 829. Plaintiffs are likewise limited to an exclusive statutory remedy for their Unfair and Deceptive Acts or Practices claim, W. Va. Code § 46A-6-104. Article 6 of the WVCCPA explicitly provides that a plaintiff's damages are "actual damages or two hundred dollars, whichever is greater." W. Va. Code § 46A-6-106. Because the statute does not contemplate punitive damages, a plaintiff is limited to her statutory remedy. *See Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832 (N.D.W. Va. 2004). Finally, for the Illegal Appraisal claim, the Circuit Court found only negligence, *see supra* at p. 25, and the law requires "more than a showing of simple negligence to recover punitive damages." *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 671, 379 S.E.2d 388, 394 (1989).

Thus, only Plaintiffs' fraud claim could legally support a punitive damages remedy. However, for the reasons stated above, the record does not support the Court's finding of fraud. Accordingly, the punitive damages award should be vacated.

B. The Circuit Court deprived Quicken Loans of procedural due process by failing to perform the required analysis of its punitive damages award.

The Circuit Court was bound to apply the factors listed in *Garnes*, 186 W. Va. 656, 413 S.E.2d 897, in deciding the punitive damages award. The consideration of these factors is necessary for "a meaningful and adequate review by the trial court using well-established principles," as well as a subsequent, *de novo*, "meaningful and adequate appellate review." *Id.*, 186 W. Va. at 667, 413 S.E.2d at 908. Indeed, the factors are a due process requirement because "[d]ue process demands not only that penalties be abstractly fair, but also that a person not be penalized without reasonable warning of the consequences of his acts." *Id.*, 186 W. Va. at 668, 413 S.E.2d at 909. Thus, where a circuit court does not "make the necessary findings required by *Garnes*," its decision to award punitive damages is "reversible error." *State ex rel. Harper-Adams v. Murray*, 224 W. Va. 86, 93-94, 680 S.E.2d 101, 108-09 (2009).

While the Circuit Court recognized that it was bound to apply the *Garnes* factors, it failed to actually do so. Instead, its entire "analysis" consisted of these two sentences:

> Taking all of the *Garnes* factors into consideration, including applying a factor of three times the compensatory damages and attorney fees, is $2,168,868.75.
>
> This Court believes that this amount fairly applies the five standards in *Garnes* including the financial position of the defendant and as a matter of fundamental fairness, assuring that the punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees.

2/17/11 Op. at 4 (A312). The Circuit Court made no findings as to reprehensibility, the relationship of punitive damages to the harm, or any other *Garnes* factor. It also failed to explain its choice of a three-times multiplier, or why it included attorney's fees and cancellation of the debt in the amount multiplied.

Such a cursory treatment of the required *Garnes* analysis is woefully insufficient. As this Court held, a trial court's superficial application of the *Garnes* factors should be reversed where

"the circuit court made no findings regarding the reprehensibility of defendant's conduct . . . whether there was a reasonable relationship of the amount awarded to the actual harm . . . [and] . . . regarding the award of punitive damages in lieu of attorneys fees." *Harper-Adams*, 224 W. Va. at 94, 680 S.E.2d at 109. Here, as in *Harper-Adams*, there are no such findings. If a trial court can simply recite the factors without any analysis, then the factors become insignificant, appellate review becomes illusory, and the *Garnes* procedural due process guarantees become mere ritual.

The Circuit Court's error was so clear that even Plaintiffs, in their post-trial brief, *agreed* that the court had not satisfied the *Garnes* requirements, and urged the court to do so:

> While sitting as the trier of fact, the Court was required to and did consider the factors set forth in . . . *Garnes* but was not expected at that time to enter findings of fact and conclusions of law with the specificity necessary for appellate review of the punitive damage award. These findings and conclusions are not entered until the review of the punitive damage award is undertaken and completed.
>
> Turning to *Garnes*, . . . plaintiffs submit that now during the pendency of post trial motions is the appropriate time for the Court to complete its review of the punitive damage award. . . . For these reasons, the Court should issue additional findings of fact and conclusions of law.

Plaintiffs' Brief in Response to Defendant's Post-Trial Motions at 31-32 (A325-26). The Circuit Court, however, rebuffed the entreaties of both parties and summarily denied all post-trial motions. Accordingly, the punitive damages award must be vacated.

C. The Circuit Court's award of punitive damages was grossly excessive and deprived Quicken Loans of due process.

Even had the Circuit Court conducted a procedurally adequate *Garnes* review – and it did not – Quicken Loans has a further substantive due process right to be free of arbitrary punishment for which it had no reasonable notice. *See State Farm*, 538 U.S. at 416-417. In particular, when reviewing a punitive damages award, this Court looks at certain aggravating and mitigating factors. *See Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 553-54,

694 S.E.2d 815, 886-87 (2010). The punitive damages award here violates due process based on both the nature of the conduct at issue and the ratio of punitive damages to actual compensatory damages.

First, even apart from the extraordinary punitive-to-compensatory ratio in this case, none of the relevant aggravating factors justifies a large award. Those factors include "(1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant; (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff." *Id.*, 225 W. Va. at 553, 694 S.E.2d at 886. In this case, there is no reprehensible conduct that would support a $2 million punitive damages award on a $144,800 loan. The only supposed fraud concerned an alleged promise to refinance in four months, by which time Mrs. Jefferson had stopped making payments; a failure to disclose the balloon payment in one particular document when it was clearly disclosed in others; and a supposed mislabeling of $2,100 in closing costs. Also, Quicken Loans had a practice against making any promise of future refinancing, and mortgage bankers were trained not to make such promises. *See* Testimony of Anthony Nuckolls, Vol. IV, pp. 101-104 (A1076). Thus, if such a promise were made, it was one employee's outlier decision to act contrary to Quicken Loans policy, with no evidence that such conduct was approved at higher levels. As for the other factors, Quicken Loans gained no profit from the loan; a $2 million award will make settlements more difficult because of the unpredictability of this result; and Quicken Loans is already paying Plaintiffs' attorney's fees. The only factor remaining is Quicken Loans' financial position, and that alone is an improper basis for a multi-million dollar award. *See State Farm*, 538 U.S. at 427.

The application of the required mitigating factors further establishes that the punitive damages award is impermissible. The mitigating factors include, as relevant here, "(1) whether the punitive damages bear a reasonable relationship to the harm . . . ; (2) whether punitive damages bear a reasonable relationship to compensatory damages; [and] (3) the cost of litigation to the defendant." *Perrine*, 225 W. Va. at 555, 694 S.E.2d at 887. These first two factors are crucial because long-settled principles of federal due process require courts to ensure that punitive damages awards are "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426.[9] The same is true under West Virginia law. *See Perrine*, 225 W. Va. at 547, 694 S.E.2d at 880 ("A proper measure of punitive damages begins with a determination of the proportionality between compensatory damages and punitive damages."). Thus, courts must determine whether the ratio of punitive to compensatory damages is appropriate. *See State Farm*, 538 U.S. at 425 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").[10]

The ratio of punitive damages to the award of restitution exceeds 120-to-1, far more than the applicable West Virginia and federal standards. Specifically, the restitution award of $17,476.72 is the only actual compensatory damages. Thus, only this amount can be used in the

[9] The third factor also supports Quicken Loans because Quicken Loans' cost of litigation was very significant, as should be obvious given Plaintiffs' attorney's fees of $495,956.25.

[10] This Court followed the same approach even before *State Farm*. *See TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 461, 419 S.E.2d 870, 874 (1992), syl. pt. 15 ("The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1.").

ratio of punitive to compensatory damages for due process purposes. And this $17,476.72 award simply cannot support a punitive damages award of over $2.1 million.

The Circuit Court's "ratio" analysis was a mirage because the denominator of the ratio was a fiction. The Circuit Court calculated the punitive award of over $2.1 million as "three times the compensatory damages and attorney fees." 2/17/11 Op. at 4 (A312). However, the Circuit Court erred under both West Virginia law and the U.S. Constitution, grossly inflating the punitive damages award by treating both the amount of debt forgiven (itself a punitive remedy) *and* the attorney's fees as compensatory damages.

1. The Circuit Court erred in treating its punitive cancellation of the note as compensation to be multiplied for punitive damages.

The amount of debt forgiven (amounting to $144,800 in principal alone) cannot rationally be included in the amount of compensatory damages for purposes of any comparison of punitive and compensatory damages. The relevant benchmark is the *harm* suffered by the particular plaintiff. *See State Farm*, 538 U.S. at 427 (ratio focuses on "proportionality to the harm"); *TXO*, 419 S.E.2d at 874, syl. pt. 13 (ratio is based on "the harm . . . from the defendant's conduct").

If cancellation of the promissory note were permissible, it would still function as a pure penalty to the lender and a pure windfall to the borrower. Because receiving $144,800 did not harm Plaintiffs, it cannot permissibly be included in the denominator of the ratio (or any similar proportionality analysis) under *TXO* or *State Farm*. Plaintiffs offered no explanation whatsoever for how they were purportedly "harmed" by receiving $144,800. Indeed, Mrs. Jefferson used the principal "to purchase a new automobile and payoff other existing debt" obligations, including numerous refinancings of her property with CitiFinancial, five separate loans from AmeriFirst Loan and CitiFinancial, and a Tax Refund Anticipation Loan from Jackson Hewitt. *See* 2/25/10 Op. at 5-7 (A130-32). Accordingly, the Circuit Court's decision to forgive the principal in its

entirety cannot be anything but a naked penalty. It was "intended to punish the defendant and to deter future wrongdoing," and it plainly did not compensate for any "concrete loss" suffered by Plaintiffs. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

The value of the underlying note therefore cannot properly provide any basis for calculating the punitive damages award in this case. A key purpose of looking at the ratio of punitive to compensatory damages is to ensure that "punitive damages awards are not grossly out of proportion to the severity of the offense," *Garnes*, 413 S.E.2d at 908 (internal quotation marks omitted), and this role is subverted when the "severity of the offense" is vastly inflated by including a cancellation remedy that does not represent actual harm to the plaintiff. Indeed, in *Perrine*, this Court recently emphasized that punitive damages must be related to damages that are truly *compensatory*, holding that "punitive damages may not be awarded on a cause of action for medical monitoring" because such claims do not involve any "actual compensatory damages." 694 S.E.2d at 880-81 (quotation marks omitted). Here, the cancellation of debt is even more clearly not compensatory. Payments for medical monitoring are at least designed to avert future harm. In contrast, Plaintiffs' receipt of $144,800 was not harm of any sort, and cancellation of their obligation to repay it cannot logically be called compensatory. *Cf. Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007) (recovery of the defendant's profits in a copyright infringement case is punitive, not compensatory). Accordingly, in analyzing a punitive damages award, a court should look to "the ratio of the punitive damages award and the *non-punitive* element of the compensatory damages." *Id.* (emphasis added). The Circuit Court should have done so here as well.

Furthermore, cancellation of an obligation, however inequitable in fact, could only be equitable in character. *See Dunn v. Rockwell*, 225 W.Va. 43, 54, 689 S.E.2d 255, 266 (2009)

("The first two causes of action – for rescission, cancellation and reformation of a deed, and for unjust enrichment – are both equitable causes of action."); Syl. pt. 3, *Laurie v. Thomas*, 170 W. Va. 276, 294 S.E.2d 78 (1982) ("Where a suit based on fraud . . . seeks to rescind a writing . . . it is not a common law action for fraud but is equitable in nature."). The equity courts did not award punitive damages, and such damages remain impermissible on equitable claims. *See, e.g.*, *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 32, 521 S.E.2d 331, 345 (1999) ("Punitive damages . . . are encompassed in the term 'legal relief.'"); *Given v. United Fuel Gas Co.*, 84 W. Va. 301, 306, 99 S.E. 476, 478 (1919) ("No authority for jurisdiction in equity to award punitive damages has been cited or found."). Consequently, the Circuit Court's one-sided "rescission" of the underlying loan cannot provide any basis for a punitive damages award.

2. The Circuit Court likewise erred by including attorney's fees in compensatory damages to be multiplied for punitive damages.

The Circuit Court also multiplied an already massive award of attorney's fees by three and included *that* amount in its punitive damages calculation. *See* 2/17/11 Op. at 4 (A312). It is clearly impermissible to ground punitive damages on statutory attorney's fees here, because the statute pursuant to which the fees were awarded (the WVCCPA) *does not authorize punitive damages awards* in the first place. Any punitive damages must rest solely on Plaintiffs' fraud claim, but the fee award was expressly made pursuant to W.Va. Code § 46A-5-104. *See* 2/25/10 Op. at 20 (A145). Accordingly, there was no statutory authority for the Circuit Court to use attorney's fees under the WVCCPA to support punitive damages.

In any event, again, only *compensatory* damages can provide a proper basis for punitive damages. Because attorney's fees are not compensatory damages, there is neither a legal nor logical basis for the Circuit Court's award.

Courts have consistently refused to count attorney's fees as compensatory in calculating the permissible ratio of compensatory to punitive damages. For example, in *State Farm*, the Supreme Court did not consider the trial court's award of $800,000 in attorney's fees and costs when assessing the constitutionally permissible ratio. Rather, the Court compared the award of $1 million in compensatory damages to the $145 million punitive damages award, and never suggested that the award of attorney's fees was pertinent. *State Farm*, 538 U.S. at 426 ("The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation."). In addition, the Court explained that the relevant ratios for punitive damages purposes are similar to statutory ratios "providing for sanctions of double, treble, or quadruple damages to deter and punish." 538 U.S. at 425. Those ratios rarely, if ever, permit inclusion of attorney fees as part of the compensatory damages that may then be multiplied to produce a final award. *See, e.g.*, W. Va. Code §§ 17A-6A-16 (treble damages separate from attorney fees), 37-15-6a (same), 47-18-9 (same).

Several courts have held that attorney's fees should not be treated as compensatory damages for purposes of determining the punitive award. Most notably, on remand from the Supreme Court in *State Farm*, the Utah Supreme Court addressed this issue head on:

> While [the Supreme Court's] analysis may not have been different had the denominator been $1,939,518.10 (the amount of the compensatory damages, special damages, excess verdict, and attorney fees combined), and the ratio thereby reduced to 75-to-1, the considerable attention given by the Supreme Court to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator.

Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 419 (Utah 2003). Several other courts have followed suit. *See Duka, Inc. v. McRae*, 839 A.2d 682, 701 n. 24 (D.C. 2003) (holding that because fee awards "include[e] a certain punitive element," they "favor[] a lesser rather than greater award"); *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (same).

The reasoning behind these decisions is simple: only actual harm may be included as compensatory damages in any ratio analysis (*see State Farm*, 538 U.S. at 427; *TXO*, 419 S.E.2d at 874), and attorney's fees do not generally compensate for actual harm to the plaintiff. This Court has repeatedly emphasized that "[a]n obvious purpose of awarding attorney fees and costs in a case involving fraud is that intentional conduct such as fraud should be punished and discouraged." *Boyd v. Goffoli*, 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004) (emphasis added); *see also Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996) (attorney's fees constitute a "penalty"). Indeed, this Court has held that – given their common punitive goal – simultaneous awards of attorney's fees and punitive damages may not be warranted at all. *See Boyd*, 216 W. Va. at 569, 608 S.E.2d at 186 ("Appellant has been sufficiently discouraged from future fraudulent conduct by the sizable punitive damages awarded by the jury. As a result, an award of attorney fees and costs is not necessary to perform this function."). In this case, the Circuit Court appeared to recognize that attorney's fees were not actually compensatory. *See* 2/17/11 Op. at 4 (A312) ("The punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees."). Nonetheless, the Circuit Court failed to appreciate the importance of this point: only "actual" compensatory damages can be used to support punitive damages. Once again, the comparison to *Perrine*, 694 S.E.2d at 879-81, is useful because the attorney's fees here are certainly less compensatory than medical monitoring payments.

The few courts holding that attorney's fees should be included in a ratio analysis did so on the basis that the particular statute at issue was compensating the plaintiff for bringing the lawsuit. *See Willow Inn, Inc. v. Public Service Mutual Ins. Co.*, 399 F.3d 224, 236 (3d Cir. 2005) (deciding to "include awards of attorney fees and costs in the ratio" for calculating punitive

damages because under the statute at issue, attorney's fees "are awarded to compensate the plaintiff for having to pay an attorney to get that to which they were contractually entitled") (internal quotation marks omitted). However, there is nothing in the statute here that suggests a compensatory purpose, *see* W. Va. Code § 46A-5-104, particularly in light of the court's discretion to decline to award fees. *See Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 305, 512 S.E.2d 217, 227 (1998) ("By using the word 'may' in conferring upon courts the power to award attorney fees [under W. Va. Code § 46A-5-104], the Legislature clearly made the granting of such awards discretionary."). Thus, the statute follows the usual West Virginia approach of reserving fee-shifting for punitive purposes. *See Boyd*, 216 W. Va. at 569, 608 S.E.2d at 186.

V. THE CIRCUIT COURT ERRED BY FAILING TO OFFSET COMPENSATORY DAMAGES AWARDED AGAINST QUICKEN LOANS WITH THE SUMS PREVIOUSLY PAID TO PLAINTIFFS BY SETTLING CO-DEFENDANTS

Quicken Loans is entitled as a matter of law to an offset of compensatory damages and the loan cancellation.[11] In May 2009, the Circuit Court dismissed all of Plaintiffs' claims against defendant Guida with prejudice based upon a settlement between those parties. Quicken Loans' cross-claim against Mr. Guida for contribution was thereby extinguished as a matter of law. Upon information and belief, the amount of the settlement was $700,000. Whatever its amount, not a cent of that settlement was applied to reduce Quicken Loans' liability.

A plaintiff is entitled to only one satisfaction for his or her injuries. *Bd. of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). Thus, where an injury is indivisible, a defendant against whom a verdict is rendered is entitled to a set-off of all sums paid in good-faith settlements by other parties who are also liable for the injury. *See* syl. pt. 7, *id.* Here, the injury is indivisible because all of Plaintiffs' alleged damages

[11] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Offset of Judgment Pursuant to Settlement of Defendant Dewey V. Guida (A340).

flow from the existence of the Loan, and the allegedly inflated appraisal by Guida was a *sine qua non* for that loan. It does not matter whether Quicken Loans and the settling party were "joint tortfeasors." If they were liable for the same damages, Plaintiffs may recover the damages only once. *See Pennington v. Bluefield Orthopedics, P.C.*, 187 W.Va. 344, 419 S.E.2d 8 (1992).

Accordingly, while punitive damages cannot be offset, *see Burgess v. Porterfield*, 196 W.Va. 178, 185, 469 S.E.2d 114, 121 (1996), Quicken Loans is entitled to an offset of all compensatory damages. Hence, if the cancellation of the principal of the Loan were deemed compensatory, which would be necessary for the punitive damages award to be upheld, then the value of the cancellation would have to be offset along with the restitution. Indeed, this Court has recognized that such equitable remedies are subject to offset. *See Thomas v. Bd. of Educ.*, 181 W.Va. 514, 519, 383 S.E.2d 318, 323 (1989).

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed as to liability for fraud and unconscionability, the award of damages should be vacated to eliminate punitive damages and cancellation of the Loan, and damages should be offset by the judgment as to former defendants.

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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, counsel of record on appeal for Petitioner Quicken Loans Inc., certify that on this 6th day of September, 2011, I served the foregoing "Brief of Petitioner Quicken Loans Inc." and "Appendix Record" by sending true and correct copies via Federal Express standard overnight and addressed as follows:

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No. 11-0910

OCT 2 1 2011

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO QUICKEN LOANS, INC.'S PETITION FOR APPEAL

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Rules

This case is about the predatory lending practices of Quicken Loans, Inc. ("Quicken"). Those practices resulted in keystone findings and conclusions of the trial court that are *not* the subject of this appeal. Specifically, Quicken *does not appeal* the trial court's conclusion that it "engaged in unfair methods of competition and unfair or deceptive acts or practices" in the following manners:

(a) Representing to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a "loan discount" on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken;

(b) Not disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment and then not properly disclosing the balloon payment at closing; and

(c) Conducting a negligent appraisal review and approving a loan based on a grossly inflated appraisal.

See, Findings of Fact and Conclusions of Law entered on Feb. 25, 2010 ("2/25/10 Op.") at p. 20 (A145). Nor does Quicken take issue with the trial court's finding that Quicken made a mortgage loan in excess of the fair market value of Respondents' home in violation of W.Va. Code § 31-17-8(m)(8). Finally, Quicken did not object to the trial court's conclusion that it failed to make the "most pertinent disclosure" for this loan – the amount of and due date for a massive balloon payment that Quicken snuck into the transaction on the eve of closing the loan in violation of W.Va. Code § 46A-2-105(2). For all of these reasons (which are now unassailable having not been appealed) and for many other reasons discussed herein, Quicken's appeal of the trial court's findings that the subject loan transaction was unconscionable and fraudulent lacks merit – the trial court should be affirmed.

Quicken's primary argument is that the trial court did not have authority to cancel Quicken's July 7, 2006 loan to Lourie Jefferson and Monique Brown (the "Loan"). However,

two separate consumer statutes expressly provide for exactly that relief. *See*, W.Va. Code § 46A-2-121 and W.Va. Code § 31-17-17. Quicken also includes a secondary claim petition for the due process review of the trial court's punitive damage award. Because the award is reasonable, and tailored to exact an equitable punishment against Quicken for its wide-ranging misconduct in this case and to deter it from future frauds against West Virginia consumers, this Court should affirm the award. Finally, Quicken is asking this Court for an offset for an entirely distinct settlement, but this relief was not timely sought from the trial court and should not be available in the first instance here. Furthermore, such relief is not substantively appropriate.

STATEMENT OF THE CASE

A. Background

At the time of the Loan, Lourie Brown (now "Jefferson") was a 42-year old single parent, who worked as a licensed practical nurse and earned on average $2,489 per month. *See*, PL Ex. 1-EE (A1551).[1] Lourie Jefferson has three children, two of whom were minors and another, Respondent Monique Brown, who is a disabled adult suffering a traumatic brain injury in 2001 which impaired her short term memory. *See*, 2/25/10 Op. at ¶ 1-2 (A128).

Ms. Jefferson and her mother, Lena Brown, bought their home at 118 12th Street, Wheeling ("the Property") in 1988 for $35,000. *Id.* at ¶ 3 (A128). They bought the Property together because it was a duplex; there were separate utilities and entryways. *Id.* at ¶ 4 (A128). In 1993, they transferred the Property to Monique, who paid off the $34,132 mortgage. *Id.* at ¶ 6 (A129).

In 2001, Ms. Jefferson was off work for several months while caring for Monique after Monique was ejected from her vehicle in a wreck. Ms. Jefferson stayed with her daughter in

[1] Monthly earnings were calculated from the reported $14.36 per hour wage and 40 average hours per week as reported by Wheeling Hospital.

Morgantown for seven months while Monique was first in a coma and then in rehabilitation. *See*, Vol. II at 180-181 (A910-911) (Jefferson). In 2002, Lena Brown passed away leaving Ms. Jefferson solely responsible for the household expenses, including utilities, maintenance, taxes and insurance for a large, older home. 2/25/10 Op. at ¶7 (A129). These difficult circumstances led Respondents to obtain a loan secured by their home with Citifinancial, as well as another, unsecured loan, also with Citifinancial. These loans were refinanced multiple times. *See*, *id.* at ¶¶ 8-12 (A129).

B. The Loan Origination and Promise of Refinancing

While on the internet, Ms. Jefferson saw a pop-up ad offering an attractive loan opportunity. She provided basic information and received telephone solicitations from different mortgage lenders. 2/25/10 Op. at ¶ 15-16 (A130). Ms. Jefferson chose Quicken because of its loan agent, or "mortgage banker", Heidi Johnson's ("Johnson") expressed willingness to help Ms. Jefferson. Quicken is a large national mortgage lender, headquartered near Detroit, Michigan. Quicken is part of a financial network and wholly owned by Rock Holdings, which is the same parent company that owns Title Source, Inc ("TSI"), an appraisal management company servicing Quicken. *Id.* at ¶ 14 (A130). Quicken had a "close relationship" with TSI and the two share office space. *See*, Vol. V at 29, 82-84 (A1143, 1156) (Lyon - Designated Corporate Representative for Quicken).

The loan process began on May 16, 2006. 2/25/10 Op. at ¶ 17 (A130). Ms. Jefferson did not "fill out" any Quicken paperwork. Information was taken over the telephone from her and entered by Johnson. Ms. Jefferson did not know the value of her home and she did not provide an estimate. Instead, she told Johnson the purchase price and provided a description of the home and improvements since purchasing it. *See*, Vol. II at 192-193 (A922-923) (Jefferson).

Accordingly, the "Anticipatory Property Value" listed on the Client Information Summary of $250,000 did not come from Ms. Jefferson. *See also*, Vol. V at 85 (A1157) (Lyon) ("I don't know if that information came from Ms. [Jefferson] or came from Ms. Johnson."). Days later, an appraisal was ordered from former co-defendant Dewey Guida and his company Appraisals Unlimited (collectively, "Guida"). The order included an estimated value for the property of $262,500. PL Ex. 1-A (A1448).

Quicken quoted Ms. Jefferson a higher monthly payment than she expected based on the pop-up advertisement. As a result, she became hesitant to do the loan. 2/25/10 Op. at ¶24 (A131). Beginning on May 24, 2006, Ms. Jefferson ceased returning Quicken's calls. *See*, PL Ex. 1-QQ, Q414-419 (A1590-1595). "On May 26, 2006, Guida concluded that the Property had a value of $181,700, using an analysis of comparables of distinctly different properties located in neighborhoods vastly superior to the Property's neighborhood." 2/25/10 Op. at ¶ 23 (A131). On May 30, 2006, Ms. Jefferson called Quicken and stated "that she no longer wants to go through with the loan." 2/25/10 Op. at ¶ 25 (A131); PL Ex. 1-QQ, Q420 (A1596).

The appraisal was approved on May 31, 2006. PL Ex. 1-QQ, Q421 (A1597) (risk decision based on 62% loan to value ratio ("LTV")). On June 1, 2006, Quicken left Ms. Jefferson a message stating that the appraisal came in where needed. *See*, PL Ex. 1-QQ, Q423 (A1599) ("we have appraisal done now though so maybe I can save"). Numerous additional messages were left for Ms. Jefferson but she did not respond. *See*, PL Ex. 1-QQ, Q426-429 (A1602-1605). Finally, there was another contact on June 6, 2006. The note to the file describes lengthy persuasion employed by Quicken to get this loan "closed:"

> Client finally reached me/she was being swayed by a broker and that's why she wanted to back out/client very timid and I just had to spend a lot of time explaining to her being taken advantage of/Adding more cash out and taking up to full 80% LTV and will have closure today.

PL Ex. 1-QQ, Q431 (A1607). *See also*, PL Ex. 4, Q2623 (A1795) (in referring to this conversation, Johnson states in an e-mail, I was "*trying to save her from going to the bank.*").

In her testimony, Ms. Jefferson completed and clarified this exchange by identifying a specific promise that fueled her change of heart and agreement to this illegal loan:

> She told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got – everything started to be paid off, then I would be able to refinance my loan.

Vol. II at 195 (A925) (Jefferson). "Lourie Jefferson understood Quicken's position to be that once her loan was in place, Quicken would be able to refinance the loan in three to four months and then she could get a cheaper rate." 2/25/10 Op. at ¶ 29 (A132). "The quid pro quo of the loan transaction between Quicken Loans and Ms. Jefferson, and which Ms. Jefferson relied upon, was that in accepting the loan offer by Quicken, she would be able to refinance the loan within three (3) to four (4) months from the date of closing, July 7, 2006." *Id.* at ¶31 (A132).[2]

In addition, Ms. Jefferson described how Quicken coaxed her into borrowing more money than she sought:

> Well, she – when they got the appraisal done, she said that it came in at $181,000, I believe. And she said that – she said: is there anything else that you're going to need because you have this money available to you? And I kind of thought about it at the time because, once I did the loan, I wasn't really going to have any money available to do anything extra with. And I had an SUV at the time that really cost me a lot of money in gas, and I decided to get a car that was going to last me for a while.

Vol. II at 196 (A926) (Jefferson).

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[2] Quicken's written training materials encourage "forward looking statements" and push the limit on promising refinancing. *See*, PL Ex. 8 at 879-80 (A2050-51). Specifically, Quicken's materials suggest telling borrowers that "your transaction with Quicken Loans/Rock Financial will assist you in your quest to reestablish a solid credit rating and the ability to transition into a conventional loan in a short period of time without a prepayment penalty." *Id.* at Q879 (A2050) ("Overcoming Objections").

Instead of sending someone to the closing who could explain the complex loan terms, Quicken sent only a third-party notary to Respondents' home to close the Loan. *See*, Vol. II at 200-201 (A930-931) (Jefferson). The closing package contained 81 pages. *See*, Vol. II at 202 (A932) (Jefferson). The notary opened the packet and instructed Ms. Jefferson to sign various documents, which were marked with "sign here" stickers. The closing took approximately 15 minutes. Ms. Jefferson felt rushed and the notary was unable to answer questions that she attempted to ask about the documents. *See*, Vol. II at 201-202 (A932-33) (Jefferson).

The first time Ms. Jefferson had any indication that there was a balloon payment on the Loan was during this rushed closing. At that time, she did not know what it meant and the Adjustable Rate Balloon Note dated July 7, 2006 [PL Ex. 1-P (A1477)] (the "Note") *did not include the amount of the balloon payment or its due date*. *See*, Vol. II at 203-204 (A933-934) (Jefferson). Despite seeing the term "balloon" at closing, Ms. Jefferson was not overly concerned because she was relying on Quicken's false promise of refinancing within three to four months. *Id.*

As is evident, the disparity of bargaining positions between Petitioner and Respondents was grossly unequal. "Gross inadequacy in bargaining power may exist where consumers are totally ignorant of the implications of what they are signing . . . or where the parties involved in the transaction include a national corporate lender on one side and unsophisticated, uneducated consumers on the other." *Herrod v. First Republic Mortgage Corp.*, 218 W.Va. 611, 616, 625 S.E.2d 373, 378 (2005) (quoting, *Hager v. American General Finance*, Inc., 37 F.Supp.2d 778 (S.D.W.Va. 1999)). Here, Quicken's own records make reference to Ms. Jefferson being "very fragile" and needing to be handled with "kid gloves." *See*, Vol. I at 130 (A557) (Saunders).

Johnson earned a commission on this loan of $834. Nuckolls Deposition at 43-44 (A362) (Designated Corporate Representative for Quicken). Commissions for Quicken employees were based on the loan amount, loan type and number of loans closed per month. *See*, *id.* at 22 (A358). The more loans and the higher the loan amounts or loan volume, the higher the commission. *Id.* at 23-24 (A358). High revenue, subprime loans, like this Loan, paid a *higher* commission than prime loans. *Id.* at 25 (A359), 35-37 (A360-361). In addition to base commission, loan agents earn additional sums on loans priced at a "*premium*" through discretionary "*discount*" points, which Johnson added to this Loan (see *infra*, at 11). *See*, Vol. IV at 182-183 (A1096) (Nuckolls). Finally, the threat of termination motivates loan agents. *See*, *id.* at 185-186 (A1097) ("Her responsibility was to close mortgages.").

C. A Broken Promise

In October 2006, Ms. Jefferson contacted Johnson to start the refinancing. However, Johnson was not responsive to Ms. Jefferson's repeated calls. 2/25/10 Op. at ¶ 37 (A133); Vol. II at 206 (A936) (Jefferson). Quicken's records confirm that Ms. Jefferson made numerous calls to Quicken and, specifically, Johnson, in October 2006 without success. The single returned call from Johnson to Ms. Jefferson lasted 37 minutes on October 11, 2006. *See*, 2/25/10 Op. at ¶ 38 (A133); PL Ex. 3, Q1994 (A1739). These logs corroborate Ms. Jefferson's testimony that she was promised a refinancing in 3 to 4 months from the closing that occurred on July 7, 2006 – matching the time frame perfectly. "Ultimately, Quicken Loans refused to refinance the . . . loan, [which] . . . constitutes a breach by Quicken of a pivotal ingredient of the loan transaction." 2/25/10 Op. at ¶ 39 (A133). Furthermore, Quicken refused the refinancing at a time when Ms. Jefferson had made all of her payments.[3]

[3] Nonetheless, Quicken attempts to fault Ms. Jefferson for missing payments presumably and hypothetically causing her credit score to drop. This, Quicken claims, is a failure on the part of Ms.

At trial, Quicken admitted that it never intended to keep its promise. In fact, Quicken's policies actually *prohibit* refinancing within 4 months because of contractual obligations with investors. *See*, Vol. IV at 175-178 (A1094-1095), 192 (A1098) (Nuckolls). Moreover, Quicken never even reported the Loan to the credit bureaus despite the fact that the premise behind the promise to refinance was that Ms. Jefferson's credit score would improve "virtually as soon as the consolidation was completed." Lyon Deposition at 105-106 (A390); *see also*, Vol. II at 142-143 (A872-873) (Saunders). Respondent's expert, Margot Saunders, who frequently testifies before Congress on consumer lending issues, explained that Quicken's failure to report its end of the debt consolidation and first two payments caused Ms. Jefferson's credit score to worsen. *Id.*

D. The Terms of the Loan

1. Adjustable Rate

On July 7, 2006, Quicken closed the Loan in the amount of $144,800. The initial, annual interest rate of 9.25% was fixed for 3 years and then adjusted every 6 months, thereafter, based on the market in London. *See*, PL Ex. 1-P (A1477-1478). The interest rate could increase to 16.25% and decrease only to 7.75%. *Id.* (A1478). The initial monthly payment on the Loan was $1,144, exclusive of taxes and insurance. PL Ex. 1-P (A1478). Ms. Jefferson's previous

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Jefferson to satisfy a condition of the promised refinancing. But there was no such condition and, in any event, it was only after Quicken declined to refinance Ms. Jefferson that Ms. Jefferson missed any Loan payment. *See*, Vol. II at 206-208 (A936-38) (Jefferson). Ms. Jefferson made the first two payments (September and October) to Quicken. *See*, Petitioner's Brief at 6. The next payment was not due until November 1, 2006, and by this time Quicken had already refused Ms. Jefferson's attempts to refinance. Moreover, the November payment was not late under the contract until November 17, which is after the four month time frame for refinancing. Further, the November payment could not be reported to the credit bureaus until December 1. *See*, Vol. IV at 63-70 (A1066-1068) (Winfree); Vol. II at 12-13 (A741-742) (Saunders).

In addition, there were no new delinquencies or other negative reporting for any of Ms. Jefferson's debts within four months of the July closing. *See*, Vol. IV at 63-70 (A1066-1068) & 88-92 (A1072-73) (Winfree)("There is nothing new on the [October 31, 2006] credit report"); Vol. II at 128, 130 (A858, 860) (Saunders)("these credit lines, were no different . . . after the Quicken loan than they were before.").

mortgage had a 30-year fixed rate of 9.75% and a monthly payment of $578. *See*, PL Ex. 18 (A2289). None of Ms. Jefferson's other debt was secured by her home. *See, infra* at 22-23

2. The Shocking Balloon Feature

Unbeknownst to Ms. Jefferson, the Loan contained an exotic feature known as a 40/30 balloon payment. There was no pre-closing disclosure of the balloon payment. *See*, Vol. V at 22 (A1141) (Lyon); Lyon Deposition at 35-36 (A372). In fact, the loan as disclosed prior to closing did *not* have a balloon feature. The loan as disclosed had a variable rate of 8.5% and an initial monthly payment of $799. *See*, PL Ex. 1-OO (A1576); PL Ex. 1-PP (A1577). When significant changes are made to a loan in processing, such as a new loan product, industry standards require that a revised good faith estimate be provided to the consumer. Quicken made no such disclosure to Ms. Jefferson. *See*, Vol. I at 120-121 (A547-548) (Saunders); Lyon Deposition at 96-98 (A387-388). Because there was no disclosure, the balloon feature was unknown to Ms. Jefferson until closing. 2/25/10 Op. at ¶ 46 (A134). And, then, it was not disclosed adequately.

West Virginia law requires conspicuous disclosure of balloon payments. The amount of the balloon payment and its due date must be stated specifically on the promissory note. *See*, W.Va. Code § 46A-2-105(2). Quicken's Note contains no such disclosure. *See*, PL Ex. 1-P (A1477-1481). As a result, Ms. Jefferson was unaware of the amount of the balloon payment and its due date when she closed the loan. *See*, Vol. I at 121-124 (A548-551) (Saunders).

Importantly, this was no ordinary balloon note. Because this loan product amortizes over 40 years, it leaves the borrower with a very large balloon payment when it becomes due in 30 years. A balloon payment of $107,000 would be due *after* 360 monthly payments ranging from $1,144 to $1,582 and totaling an estimated $550,084. *See*, PL Ex. 1-F (A1454). The total finance charge for this Loan was estimated according to federal standards at $520,065, which is

nearly *four times the amount financed.* 2/25/10 Op. at ¶ 45 (A134). Saunders explained the 40/30 product was short-lived, rare, and considered dangerous. She further opined that it was an outrageous product with a huge finance charge. Vol. II at 113 (A843) (Saunders). Quicken pulled this product entirely in early 2007 – less than a year after it was introduced. *See*, Vol. V at 132 (A1168) (Banfield - Designated Corporate Representative for Quicken).

The Note further states that the lender is under no obligation to refinance the loan when the balloon becomes due. *See*, PL Ex. 1-P (A1477). Moreover, because the loan exceeded the fair market value of the home by $98,000 (see *infra* at 12), refinancing with any law-abiding lender would be impossible. Thus, Ms. Jefferson's fate and the fate of her disabled daughter were sealed at the Loan closing. *After paying more than half of a million dollars on the Loan, Ms. Jefferson at 72 years of age and Ms. Brown at 57 years of age and disabled, would have to come up with another $107,000 or face foreclosure.*

Quicken also failed to disclose to Ms. Jefferson that she qualified for essentially the same loan *without the balloon payment*. *See*, Vol. V at 133-135 (A1169) (Banfield). Eliminating the massive balloon would have cost Ms. Jefferson a mere $33 per month or approximately $12,000 over the life of the Loan. *See*, Vol. I at 94-95 (A521-522) (Saunders). Quicken's incentive for steering Ms. Jefferson away from a fairly conventional loan into a short-lived, rare and dangerous balloon loan was profit driven to the tune of $95,000.

3. Excessive Points and Closing Costs

Quicken charged Ms. Jefferson 4 points or 4% of the Loan for what it termed a "loan discount", which equals $5,792. *See*, PL Ex. 1-L (A1460). Discount points are intended to be in exchange for a reduction of the interest rate. Vol. I at 96 (A523) (Saunders). Consistent therewith, Quicken represented to Ms. Jefferson that if she paid more money towards the closing

costs that the interest rate on the loan would be reduced. 2/25/10 Op. at ¶ 41 (A134). But, here, there was no benefit to Ms. Jefferson. 2/25/10 Op. at ¶ 42 (A134); *see also*, Vol. I at 96-98 (A523-525) (Saunders). According to the applicable pricing sheet, the standard pricing for the Loan was the 9.25% initial interest rate with only 2.5 "discount" points. *See*, Vol. V at 139-140 (A1170) (Banfield). In addition to standard pricing, Quicken expressly allows its loan agents to overcharge borrowers when they get the chance and at their discretion.

> (i) General Rule – As a general rule, Mortgage Bankers are required to adhere to Quicken Loans published daily rates in quoting rates, points, fees and programs to prospective clients.
>
> (ii) Premiums – Mortgage Bankers shall have the discretion to charge a rate/point/fee structure that exceeds the daily price sheet on certain products, provided that the price charged does not exceed the daily price sheet price by more than two points. The additional revenue resulting from the Mortgage Banker's proper exercise of such discretion is considered the "premium" for purposes of Section I B above.

PL Ex. 9, Q1010 (A2157).

Ms. Jefferson paid an additional 1.5 points without any corresponding interest rate deduction.

> Q. So they charge the highest rate they could given the standard amount of points is that what your testimony is, a standard 2.5 points and then they added a 1.5 percent premium within the points?
> A. Correct.

Banfield Deposition at 51-52 (A415).

This $2,100 was pure profit to Quicken from which Johnson received a share. Vol. V at 139-140 (A1170) (Banfield). Therefore, the premium had *nothing* to do with any increase in risk – as the risks were fully accounted for in Quicken's daily pricing sheets, which established the required, final qualifying price for the loan. The premium was purely an extra charge that Quicken encouraged its agents to get from whomever was unwary enough to pay it by giving the

agent a cut. In all, the total closing costs to Ms. Jefferson were $8,889. PL Ex. 1-L (A1460-1461).

E. The Bogus Appraisal

1. The Appraiser-Lender Relationship

Guida appraised over 100 properties for loans made by Quicken. Vol. 1 at 178 (A605) (Saunders). Quicken provided TSI with an estimated value to provide to its appraisers, including Guida. *See*, Vol. V at 68 (A1152) (Lyon). Quicken offered the following as its reason for doing so: "It gives an appraiser an ability to see what they are going to potentially look at the property at." Vol. V at 69-70 (A1153) (Lyon). Whether or not this statement is an admission to influencing appraisers, Quicken plainly conceded that providing such an estimate was unnecessary. Lyon Deposition at 53 (A377). The trial court found that there is no bona fide purpose in providing an "estimated" value to an appraiser. *See*, 2/25/10 Op. at ¶ 50 (A135); *see also*, Vol. I at 229 (A657) (Saunders).

The TSI appraisal order form labels the target figure, as the "Applicant's Estimated Value." However, Ms. Jefferson provided no value and, even the value she allegedly provided ($250,000), was not the figure ($262,500) that TSI provided to Guida. *Compare*, QL Ex. 64 (A1295) to PL Ex. 1-A (A1448). The suggestion of $262,500 was nearly *$200,000 more than the highest sale in her neighborhood during the previous five years*. 2/25/10 Op. at ¶ 50 (A135). While Guida did not hit Quicken's target, it appears that he got the point by arriving at an inflated appraised value of $181,700, which was more than sufficient to make the Loan and to offer additional cash to Ms. Jefferson. Furthermore, there was evidence of direct contact between Quicken and Guida. Guida had a handwritten telephone number for Quicken notated in

his appraisal file, as opposed to TSI's telephone number. PL Ex. 13 at B5107 (A2200) ("1-800-226-6308"). Quicken stipulated that this was its telephone number. Vol. V at 267-268 (A1202).

2. A Grossly Inflated Appraisal

The true market value for the Property was $46,000. 2/25/10 Op. at ¶ 56 (A136). "During the review process, Quicken Loans ignored obvious flaws in the inflated Guida appraisal. Furthermore, Quicken violated its own appraisal review standards and the Uniform Standards of Professional Appraisal Practice (hereinafter "USPAP")." 2/25/10 Op. at ¶¶ 57-59 (A136-139) (citing 3 pages of examples). Nonetheless, Quicken did not inquire of Guida after receiving the appraisal. *See*, Fica Deposition at 45 (A419) (Quicken's appraisal review analyst).

Moreover, there is substantial evidence of appraisal inflation within the loan file itself:

- Quicken obtained but did not consider an automated appraisal review that revealed *twenty areas of concern* – many of which echoed Respondents' appraisal expert, Troy Sneddon. *See*, PL Ex. 1-CC (A1534); Fica Deposition at 51-53 (A420-421).

- Quicken's appraisal analyst based her approval on a 62% CLTV (combined loan to value - here, equivalent to loan to value). *See*, Fica Deposition at 33-34, 45-47 (A418-419). Yet no further underwriting of the appraisal was undertaken after the cash out was increased on June 6 and the equity or cushion shrunk from 38% to 20% for the completed loan. *See*, Vol. II at 150-151 (A880-881) (Saunders).

- Quicken boldly ignored the assessed value of $20,640 for the Property in its file. *See*, PL Ex. 1-BB, Q292 (A1530).

Finally, in her notes, Johnson reveals that a Quicken employee actually identified valuation issues and suspended the loan for a time before being overruled by their director.

> This is the second time I have updated this loan from suspense status/. . . *first suspense was for low appraisal issues/director told me I was okay for the first one* and am following up for the second suspense/

PL Ex. 1-QQ, Q438 (A1614) (emphasis supplied). But in the end, Guida's value was fine by Quicken, which had every intention of increasing the Loan amount and selling the loan.

F. Quicken's Business Model

Quicken's goal is to sell 100% of its loans and to avoid "get[ting] stuck with loans." *See*, Vol. IV at 176 (A1094) (Nuckolls); Banfield Deposition at 16-17 (A411-412). "Quicken has the ability to do what's called interim servicing . . . But we do not have a strategy of holding services for the long term." *Id.* at 19 (A412). Quicken creates a pool of loans and sells the pool on the secondary market.[4] *See*, Banfield Deposition at 20-21 (A412-413). The larger the loan - the more Quicken makes in both points and sales. *See*, Vol. I at 187-189 (A614-616) (Saunders).

Quicken attempted to sell this Loan numerous times. *See*, Vol. V at 105-111 (A1162-1163) (Banfield). Initially, Quicken was not able to sell the Loan for compliance issues, including apparent non-compliance with the Truth in Lending Act and/or the West Virginia Tangible Net Benefit requirement. *See, id.* Subsequently, the Loan could not be sold because Ms. Jefferson defaulted. The appraisal in no way prohibited Quicken from selling the Loan. *See*, Vol. V at 105-107, 112 (A1162) (Banfield); PL Ex. 1-G (A1455).

On or about February 21, 2007, Quicken obtained a second appraisal from a state-licensed appraiser, Michael Doyle, in anticipation of foreclosure. Therein, Doyle opined that the Property had a value of only $56,000 – over $125,000 less than Guida's value. *See*, Vol. I at 149-150 (A576-577) (Saunders); PL Ex. 22 (A2325); PL Ex. 23, Q643 (A2349). Nevertheless, Quicken's efforts to sell the Loan continued into April of 2007. *See*, Vol. V at 111 (A1163) (Banfield). Thus, despite this independent opinion of appraisal inflation, Quicken still attempted to sell the Loan on the secondary market. *See*, Vol. V at 202 (A1186) (Borelli).

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[4] Quicken sells loans subject to certain representations and warranties. In general, Quicken warrants that it properly processes appraisals. But Quicken does not warrant that the appraised value it obtains for collateral is reasonable or accurate in terms of fair market value. These standard representations and warranties were not sufficient to deter loan originators from obtaining inflated appraisals in order to make and sell loans. *See*, Vol. VI at 31-32, 37-41, 45-48 (A1220, 1222-24) (Saunders); *see also*, Vol. V at 131-132 (1168) (Banfield). Since Quicken does not hold loans, it has little incentive (or *skin in the game*) to make sure a loan is covered by the property. See, Vol. I at 105-107 (A532-34) (Saunders).

G. Foreclosure and Procedural History

Within months of closing the Loan, in January 2007, Ms. Jefferson underwent surgery. Because of a hemorrhage, she had to undergo a second surgery on an emergency basis. Ms. Jefferson was required to be off work for at least a few months. She advised Quicken of the same and asked for assistance. Several of her pleas for help over the next *six* months were in writing. *See*, PL Exs. 27 (A2362), 29 (A2365) & 32 (A2370). Though Ms. Jefferson was able to make payments in January and February, Quicken was unwilling to work with Ms. Jefferson in any manner. *See*, Vol. II at 210-214 (A940-944) (Jefferson); Vol. IV at 129-130 (A1083) (Nuckolls) (Quicken categorically did not make loan modifications); PL Ex. 28, (A2363). On July 27, 2007, Quicken issued a notice of acceleration of the balance through the Trustee named in the Deed of Trust. PL Ex. 33 (A2371).

In August 2007, Respondents provided statutory notice of a claim and afforded Quicken a right to cure under W.Va. Code § 46A-6-106(b). *See*, PL Exs. 34 (A2373) & 35 (A2375). No cure offer was made. Instead, the Notice of Foreclosure Sale was issued. *See*, PL Ex. 38 (A2380). Respondents were forced to file suit and obtain injunctive relief from the trial court to avoid the immediate loss of their home. *See*, PL Application for Preliminary Injunction (Feb 1. 2008) (A31). While the lawsuit was pending, Respondents voluntarily agreed to pay and did pay without delay $578 per month to Quicken. *See*, Vol. IV at 84-85 (A1071-1072) (Winfree); PL Exs. 39 (A2381-2399) & 53 (A2453).

The trial court conducted a 6 day trial beginning on October 5, 2009 in which the court heard from 9 witnesses, including 4 experts, and entertained hundreds of exhibits that included more than 5,000 pages of material.[5] In addition, six depositions were admitted into evidence.

[5] In its appeal, Quicken does not a raise a single pretrial or evidentiary error. In fact, Quicken prevailed on most of the evidentiary rulings. The trial court excluded pattern and practice evidence offered under

Following the trial, the trial court set a briefing schedule and heard argument on December 2, 2009. On February 25, 2010, the trial court entered its 26 page Memorandum of Opinion.

Therein, the trial court determined the Loan to be unconscionably induced. The trial court also concluded that the Loan contained unconscionable terms, including: (1) excessive closing costs, (2) the premium charged for the phony "loan discount," (3) the $107,015 balloon payment after 30 years of high payments, and (4) the drastically inflated appraisal that led to a loan amount which prohibited Ms. Jefferson from ever refinancing or selling her home. The trial court also ruled that a 40/30 loan structure under a circumstance where an inflated appraisal makes refinancing impossible is "in and of itself unconscionable," as a borrower cannot avoid the massive balloon payment.

The trial court also determined Quicken's loan practices to be unfair and deceptive. Likewise, the trial court found Quicken liable for fraud with respect to the false promise of refinancing, the phony interest rate buy-down and the concealment of the balloon payment. The trial court went on to find a willful violation of § 31-17-8(m)(8) regarding the making of a loan in excess of a property's fair market value and a violation of § 46A-2-105(2) regarding non-compliance with the balloon payment disclosure.

As damages, the trial court ordered $17,476.72 in restitution of payments; cancelled the mortgage loan obligation; and awarded attorney fees under both W. Va. Code § 46A-5-104 and § 31-17-17(c). The trial court *did not* award emotional distress damages. Finally, the trial court concluded that the cumulative effect of Quicken's misconduct warranted "a" punitive damage award under *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996)

W.Va. Evid. Rule 404(b) regarding four other loans to Ohio County residents that were based on inflated appraisals obtained from Guida by Quicken around the same time as this Loan. It also denied a motion seeking an adverse inference regarding missing loan notes that Respondents contended would reveal that Quicken first obtained an appraisal from someone other than Guida that did not support the loan.

(affirming the *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) standard), a decision which was written by then – Justice Recht. Quicken does not contest the trial court's application of or conclusion under *Mayer* in its perfected appeal.

On Wednesday, September 1, 2010, the trial court held Phase II of the trial on the *Garnes* factors.[6] *See*, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Thereafter, the parties submitted briefs arguing the *Garnes* factors and reply briefs thereto. On February 17, 2011, after considering all the *Garnes* factors and engaging in the ratio analysis of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), the trial court issued its punitive damage award and entered judgment. Quicken timely filed post-trial motions, which were later denied, but failed to preserve the motion for an offset of settlement and the trial court did not reach the motion.

SUMMARY OF THE ARGUMENT

Quicken's first assignment of error addresses only the trial court's finding of unconscionable terms, which it attacks on substantive unconscionability grounds alone. Quicken's argument regarding substantive unconscionability is done in by the lethal combination of an inescapable loan (as a result of the vastly inflated appraisal) and massive balloon payment after 30 years of considerable monthly payments, which complement a heavy dose of procedural unconscionability.

In its second assignment, Quicken falls well short of proving that the trial court abused its discretion in its findings of fraud. The primary motivating and facilitating factor behind this Loan was Quicken's false promise to refinance it within three to four months of closing. Ms.

[6] The trial court also took evidence regarding the reasonableness of plaintiffs' attorney fees and costs and ultimately entered a reduced award. The right to or reasonableness of this award has not been appealed despite some derogatory statements regarding the amount of the award in Petitioner's Brief at 8. *But see* Petitioner's Brief at FN 9, claiming for the first time that it had similar litigation costs.

Jefferson's testimony was supported by Quicken's loan notes, its call logs and its training practices. In addition, the trial court correctly concluded that the phony interest-rate-buy-down and hidden balloon payment were not only unfair and deceptive in violation of statute (which findings Quicken does not appeal) but also fraudulent.

For its third assignment of error, Quicken attempts to create issues of statutory interpretation and asks this Court to strip consumers of long-standing statutory remedies against abusive creditors. This Court rejected an analogous attack on consumers last term in *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 711 S.E.2d 577 (2011) and affirmed the historic principle that the West Virginia Consumer Credit and Protection Act ("WVCCPA" or "the Act") is a remedial statute and entitled to liberal construction to accomplish its purpose of protecting consumers. However, here, less construction is needed than in *Barr*, as W.Va. Code §46A-2-121 and § 31-17-17 are plain on their face and permit the voiding of illegal and unconscionable loans.

Fourth, Quicken argues that the trial court erred by "failing to apply the required factors under *Garnes*." The trial court conducted an evidentiary hearing specifically addressing the *Garnes* factors, which was followed by two rounds of briefing applying the *Garnes* factors to this case. Given this and the fact that the punitive claim was tried to the bench, as opposed to a jury, the trial court was correct that its initial 26-page Order of February 25, 2010 in conjunction with its Order of February 17, 2011, are sufficient to document the basis of the trial court's own punitive award. The canceling of the Loan and award of attorney fees were compensatory and remedial in nature, alleviating the harm caused, and, therefore, the trial court properly considered the same in its ratio analysis under *TXO*, 187 W.Va. 457, 419 S.E.2d 870.

Finally, Quicken's last assignment of error is improperly before this Court, as the motion for offset was never ruled upon by the trial court. Had the trial court reached the issue, it would likely have determined any offset waived as the motion was not timely filed under W. Va. Rule of Civil Procedure 59(e) or, alternatively, without merit as the elements for offset under *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.,* 182 W.Va. 597, 390 S.E.2d 796 (1990) are not present.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner's assignments of error largely involve claims of insufficient evidence or results against the weight of the evidence. Nonetheless, Respondents believe that the decisional process would be aided by oral argument and the case is appropriate for the Rule 20 docket because it involves issues of fundamental public importance to West Virginia consumers.

ARGUMENT

I. The Trial Court's Findings Regarding Unconscionability Were Supported By Overwhelming Evidence

The trial court held that the Loan was both "induced by unconscionable conduct" under W.Va. Code § 46A-2-121(1)(a) and "contained grossly unfair and unconscionable terms" under W.Va. Code § 46A-2-121(1)(b). *See*, 2/25/10 Op. at p. 17, ¶¶ 4, 5 (A142). Quicken appeals only the latter in limiting its argument to the trial court's findings regarding substantive unconscionability. For this reason, the Court can affirm the unconscionable inducement finding.

Ms. Jefferson expressly told Quicken that she was declining the loan and stopped taking Quicken's calls because she felt the quoted monthly payment was more than she could afford. After tipping off the appraiser and securing the vastly inflated appraisal, Quicken developed a plan to "save" the deal and, more specifically, "save her from going to the bank." First, Quicken convinced Ms. Jefferson that a broker she was dealing with was taking advantage of her. PL Ex.

1-QQ, Q431 (A1607). Second, Quicken falsely promised to refinance Ms. Jefferson at a better rate just as soon as this Loan, which paid off multiple debts, was reflected on her credit report. *See*, 2/25/10 Op. at ¶31 (A132). Third, Quicken baited Ms. Jefferson with an additional $27,000 in cash out based on the inflated appraisal. *Compare*, PL Ex 1-L (A1460) to 1-OO (A1576).

The WVCCPA states:

> (1) With respect to a transaction which is or gives rise to a . . . consumer loan, if the court as a matter of law finds:
>
> (a) The agreement or transaction to have been unconscionable at the time it was made, **or** to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, **or**
>
> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

§ 46A-2-121 (emphasis supplied). The use of the word "or" means that unconscionable inducement alone is sufficient to hold an agreement unenforceable. *Compare*, § 46A-2-121 to W.Va. Code § 46-2-302 (Uniform Commercial Code) (omitting unconscionable inducement). "This Court has noted that the common law concept of unconscionability is largely the same as that articulated in the [U.C.C.]." *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749, fn. 3 (1986). However, the WVCCPA's express terms set up unconscionable inducement as a standalone claim under the § 46A-2-121 disjunctive test quoted above.

Brown v. Genesis Healthcare Corp., ---W.Va.---, --- S.E. 2d ---, 2011 WL 2611327, Syl. Pt. 20 (2011) ("A *contract term* is unenforceable if it is both procedurally and substantively unconscionable . . .") (emphasis supplied), relied on by Quicken, sets forth the *common law* unconscionability analysis. *Id.* ("The second area of the law we are asked to examine concerns the common-law doctrine of unconscionability."). *Genesis* did not examine unconscionable

inducement as defined by the WVCCPA. In fact, this Court has expressly distinguished the *statutory* unconscionable inducement clause by identifying it as "fraud." *See*, *One Valley Bank v. Bolen*, 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) (§ 46A-2-121 "expressly deals with conduct that is 'unconscionable' which we have equated with 'fraudulent conduct.'"). Therefore, *Brown* does not expand what Jefferson must show to prevail – under the statute, unconscionable inducement is enough.

As for § 46A-2-121(1)(b), the facts demonstrated the substantive unconscionability of this Loan, as the Loan was a recipe for financial disaster for Respondents. Ms. Jefferson was charged nearly $9,000 upfront when the Loan closed, which included $2,100 for a sham reduction of the interest rate. Respondents were also subject to a grossly inflated appraisal that resulted in a lien on their home of nearly $100,000 more than the home's fair market value. Respondents were not just underwater – they were drowning.

In *Herrod*, 218 W.Va. 611, 625 S.E.2d 373, this Court reversed a trial court's grant of summary judgment to a mortgage lender, finding that there was sufficient evidence of excessive fees and an inflated appraisal leading to an underwater loan. *Id.* at 617-618, 379-380. Similarly, in *Bishop v. Quicken Loans, Inc.*, 2011 WL 1321360 (S.D.W.Va. 2011), Judge Copenhaver, citing this Court's decision in *Herrod*, denied summary judgment to Quicken on a similar unconscionability claim because of questions of fact regarding "the presence of excessive fees and excessive valuation render[ing] the terms of the ... note unreasonably favorable to Quicken." *Id.* at *5. What is more, neither the Herrods nor the Bishops faced a massive balloon payment that caps off a finance charge of over a half-million dollars – nearly 4 times the amount financed. 2/25/10 Op. at ¶ 45 (A134). And, because of the grossly inflated appraisal, there was no way to avoid the balloon popping. At age 72, when the $107,000 balloon payment came due, Ms.

Jefferson would simply have to pack her bags, while Quicken pocketed the half-million dollar finance charge, the Property and for good measure a deficiency judgment against Ms. Jefferson for the balance due. *It is the combination of the inflated appraisal and the 40/30 balloon payment that makes this Loan lethal.*

Accordingly, Quicken wisely attempts to focus the Court's attention on other terms. The gist of Quicken's argument is that the Loan cannot be substantively unconscionable because the Loan allegedly lowered Ms. Jefferson's interest rate, lowered her total monthly payments and provided her with money. The first two points are only a fraction of the story and the benefit of the money loaned was far outweighed by the cost. Further, the loans at issue in *Herrod* and *Bishop* similarly involved decreased (initial) interest rates, decreased (initial) monthly payments and money, but this did not prevent a finding of unconscionability. *See*, *Herrod*, 218 W.Va. at 614, 625 S.E.2d at 376; *Bishop*, 2011 WL 1321360, *2-3.

The Loan, here, converted a 9.75% fixed rate mortgage to a variable rate ranging from 7.75% to 16.25%. The initial rate of 9.25% for the Loan was good for only 3 years. Again, because of the inflated appraisal, there was no way to refinance with another law-abiding lender to protect against rate changes. At the highest rate, the monthly mortgage payment equaled $1,582 per month, exclusive of taxes and insurance, or 64% of Ms. Jefferson's income at the time the Loan closed. Thus, this variable rate feature had no real upside for the Respondents.

The argument that Ms. Jefferson's total monthly payments decreased is even more flawed. The initial $316 in monthly savings is short lived. With the exception of the Citifinancial mortgage, Ms. Jefferson's debts were all short term and, therefore, the purported savings was short term, as demonstrated in the chart below derived from the testimony of Quicken's financial expert, Morgan Winfree. *See*, Vol. IV at 74-82 (A1069-1071) (Winfree).

Number of Months From July 2006 Closing	Combined Monthly Payment for: CitiFinancial Mortgage & Unsecured Debts	Monthly Payment for: Quicken Loan (100% Secured)
1	$1,460	$1,144
10	$1,361	$1,144
29	$878	$1,144
33	$808	$1,144
60	$578	$1,582
360	0	$107,015
Total Payments	**$308,973**	**$657,099**

The total cost of the Loan when compared to Ms. Jefferson's combined prior debts was an additional $349,000 in monthly payments. *See, id.* at 82 (A1071) (Winfree) ("I think it is highlighted at the bottom of your chart there, the difference would be about $349,000").

Quicken's argument regarding the comparison of monthly payments before and after the subject refinancing is further flawed because it places secured and unsecured debt on equal footing. *See*, Vol. I at 117 (A544) (Saunders). Here, Quicken *doubled* Ms. Jefferson's home-secured monthly payments which the trial court found jeopardized the Respondents' home. Plainly, Ms. Jefferson's credit history showed an income problem beginning with being off work to care for her daughter and, culminating in her mother's death which transferred all of the household expenses to Ms. Jefferson. Securing these unsecured debts against the family home given Ms. Jefferson's income, obligations and poor credit history was unconscionable, as doing so was likely to cost the family their home.[7] However, the trial court in no way formulated a *per se* rule that consolidating debts is unconscionable as Quicken suggests. *See*, *Herrod*, 218 W.Va.

[7] This refinancing also denied Ms. Jefferson of the available option of discharging all of her unsecured debts in bankruptcy and leaving only the secured Citifinancial loan and its $578 monthly payment. By securing Ms. Jefferson's unsecured debts against her home, bankruptcy ceased to be a viable option. *See*, Vol. IV at 83-85 (A1071-1072) (Winfree).

at 617, 625 S.E.2d at 379 ("The particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others.")(citation omitted). Certainly, debt consolidation can be a healthy and prosperous endeavor for a homeowner who can readily afford the increased mortgage payments and whose income is high enough to take advantage of the tax incentive. But Ms. Jefferson was not that homeowner, and she was better off protecting her home with a lower mortgage payment.

Thus, Petitioner is reduced to the issue of cash out. It is worth noting again that Ms. Jefferson took this money at Quicken's urging based on the spurious appraisal, and that Quicken benefits from higher loans in the form of increased volume and loan fees. Still, Quicken argues that Ms. Jefferson "needed an immediate cash payout" (Petitioner's Brief at 13), but it cites nothing in the record as support. Ms. Jefferson purchased a new Toyota because of fuel efficiency and longevity, not because of any immediate need for a new vehicle. *See*, Vol. II at 196 (A926) (Jefferson). With that said, the $40,000 in cash out cost Ms. Jefferson $349,000 in increased monthly payments and nearly $9,000 in up front closing costs. Thus, the cash that was largely used for an automobile upgrade was not a fair deal or anywhere near worth the cost.

While abundant evidence of both procedural unconscionability and substantive unconscionability exists, Respondents suggest that the false promise of refinancing, along with the appraiser influence, should be heavily weighted on the procedural side of the sliding scale under *Genesis Healthcare*. The record is clear – Ms. Jefferson had made a decision to walk away from Quicken until the deceptive sales tactics on June 6. Additionally, Quicken put Ms. Jefferson through a rushed closing, where new loan terms had been added, where only a notary was present, where none of her questions could be answered, and where she was simply told to

sign where the sticky notes indicated. On the substantive side of the scale, it is the lethal combination of a vastly inflated appraisal and massive balloon payment after 30 years of considerable monthly payments that can lead to no other conclusion than that reached by the trial court. For these reasons, the trial court should be AFFIRMED.

II. The Trial Court Was Well Within Its Discretion In Finding Fraud Not Once, But Three Times

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard . . ." Syl. pt. 1, *Public Citizen, Inc. v. First National Bank*, 198 W.Va. 329, 480 S.E.2d 538 (1996). Quicken has failed to meet the standard for overturning the trial court's three findings of fraud.

A. Ms. Jefferson's Testimony Regarding the False Promise of Refinancing was Widely Corroborated and Quicken's Intent Conceded

Quicken makes two arguments regarding the trial court's conclusion that it defrauded Ms. Jefferson by falsely promising to refinance the Loan - (1) there was insufficient evidence of the false promise, and (2) there was insufficient evidence of intent. Neither argument is persuasive.

Respondents demonstrated that Quicken fraudulently promised Ms. Jefferson that it would refinance the subject loan. Ms. Jefferson testified specifically about this promise at trial.

> She told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and . . . everything started to be paid off, then I would be able to refinance my loan.

Vol. II at 195 (A925) (Jefferson). Ms. Jefferson's testimony was not "uncorroborated." Instead, it was consistent with Quicken's own notes, confirming that Ms. Jefferson declined the Loan until the June 6 promise. *See*, 2/25/10 Op. at ¶¶ 24-31 (A131-132).

Quicken's sales tactics, including the making of "forward looking statements," also corroborate Ms. Jefferson. The impact of these training manuals was conceded by Quicken at the punitive phase of the trial.

> Q. Since 2006, has Quicken Loans done anything to ensure these types of promises are not made again?
> A. Yes.
> Q. What is that?
> A. We don't train our mortgage bankers to make these forward looking statements... *so we ensure this won't happen again.*

Phase II at 148 (A2440) (Nuckolls) (emphasis supplied). Most of all, Ms. Jefferson's testimony was corroborated by the documented efforts to obtain the promised refinancing directly from Johnson beginning in October of 2006 - three months after the loan closed. *See*, 2/25/10 Op. at ¶¶ 37-38 (A133). Perhaps, most tellingly, Quicken failed to call Johnson at the trial to dispute Ms. Jefferson's testimony.

With respect to Quicken's intent at the time of making this false promise, Quicken quite candidly admitted that it never intended to follow through on any promise made. In fact, at various times when Quicken perceives the argument helpful (but not at other times), Quicken argues that Johnson had no authority to make such a promise. *See*, Petitioner's Brief at 32. Moreover, Quicken argued it has policies against its loan agents refinancing loans within 4 months of a closing because of contractual obligations to investors. *See*, Vol. IV at 29 (A1058) (Quicken's Opening Statement)("Quicken, except in the most extraordinary circumstances, which will be explained to the Court, and having nothing at all to do with the kind of conversation we are describing, cannot and does not refinance in under four months.").

In addition, the promise was based on the premise that Ms. Jefferson's credit score would improve "once that loan was in place" and the refinancing was calculated into her credit score. But, Quicken never even reported the Loan to the credit bureaus to allow for the increased credit

score. *See*, *supra* at 7-8 & Fn. 3. Finally, Quicken's intent is established for the same levelheaded reason it was evident in *Bishop*, in which case Quicken made a similar false promise of refinancing to a West Virginia consumer.

> Nevertheless, plaintiffs have presented sufficient evidence that Quicken Loans materially misrepresented that it would refinance the December 2006 note to a fixed-rate loan before the adjustable interest rate could increase. Ordinarily, fraud "cannot be based on statements which are promissory in nature or which constitute expressions of intention." *Croston v. Emax Oil Co.*, 195 W. Va. 86, 464 S.E.2d 728, 732 (1995). Only if the plaintiff can show that the defendant did not intend to fulfill the promise at the time it was made may a promissory statement serve as the basis of fraud. *Id.* Here, in response to concerns raised by Mrs. Bishop, Mr. Snively assured plaintiffs that the December 2006 note would be refinanced to a fixed-rate loan before any increase in the adjustable interest rate. *That Mr. Snively failed to incorporate this promise into the official loan documents surrounding the December 2006 note (which, of course, bound plaintiffs to pay an adjustable interest rate) raises a question of material fact regarding Quicken Loans' intentions to fulfill the promise at the time it was made. See, England v. MG Invs., Inc.*, 93 F.Supp.2d 718, 722 [S.D.W.Va. 2000] (holding that lender's failure to include oral promise concerning interest rate into written loan documents raised question concerning lender's intent to abide by promise).

Bishop v. Quicken Loans, Inc., 2011 WL 1321360, *9 (emphasis supplied).

B. The Massive Balloon Payment was Fraudulently Concealed

The trial court concluded that Quicken fraudulently concealed the balloon payment prior to closing and then "the balloon payment amount and due date at closing." 2/25/10 Op. at p. 22 (A147). "Fraudulent concealment involves the concealment of facts by one with knowledge, or the means of knowledge, and the duty to disclose, coupled with an intention to mislead or defraud." *Trafalgar House Constr., Inc. v. ZMM, Inc.*, 211 W.Va. 578, 585, 567 S.E.2d 294, 301 (2002). Quicken argues that there was no concealment or intent to conceal the balloon payment.

Ms. Jefferson had no way of knowing that there was a balloon prior to receiving the Loan closing packet. In fact, the loan as disclosed *had no* balloon feature. It is undisputed and entirely logical that when significant changes are made to a loan in process, industry standards

require a new good faith estimate. But, Quicken made no revised disclosure and, therefore, denied Ms. Jefferson of an opportunity to pursue other options prior to closing.

Quicken also breached its statutory duty to meaningfully and conspicuously disclose the balloon payment at closing. The trial court found that there was some disclosure of the balloon feature at the door to door, notary-conducted closing (i.e., the Note included the term "Balloon" in its title"), but such notice is wholly inadequate, as the consumer is left to sort through legal jargon only to perform an actuarial calculation of the balloon payment. For these reasons, the Legislature required a plain and simple disclosure of the due date and amount of the balloon.

As for intent, Quicken disregarded the statute, as well as industry guidelines, by concealing the balloon payment for as long as possible and as much as possible. *See*, Syl. Pt. 3, *Rogerson v. Rogerson*, 152 W.Va. 169, 150 S.E.2d 159 (1968) ("Fraud does not have to be proved by direct and positive evidence but may be established by circumstantial evidence"). The circumstances, here, are such that Quicken was able to perpetrate a well crafted bait and switch on the Respondents through the concealment of the *amount* of the balloon payment.

Quicken briefly addresses the element of reliance. Note, "[i]t is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff. If the representations contributed to the formation of the conclusion in the plaintiff's mind, that is enough...." Syl. Pt. 3, *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927). Further, in the context of fraudulent concealment, this Court has applied an objective "but for" standard to the element of reliance. *See*, *White v. Wyeth*, 227 W.Va. 131, 705 S.E. 2d 828, 837 (2010). *See also*, *Pocahontas Min. Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W.Va. 169, 175, 503 S.E.2d 258, 264 (1998) (Workman, J., concurring) (discussing reliance in concealment claim). Plainly, a $107,000 balloon payment after 30 years of considerable payments on a

$144,000 loan would not be tolerated by any reasonable person (especially, when the balloon saved her only $33 per month). Thus, Ms. Jefferson, like any reasonable person, would have declined but for the concealment of the balloon payment. The fact that she was distracted by another fraudulent act – the promise of refinancing - cannot exonerate Quicken.

C. Quicken Defrauded Ms. Jefferson with an Illusory Interest Rate Reduction

Quicken charged Ms. Jefferson 4 points for what the settlement statement portrayed as a "loan discount" fee. Points are intended to benefit the borrower by reducing the interest rate on the loan. But, here, at least 1.5 points had absolutely no benefit to Ms. Jefferson.

Ms. Jefferson qualified for the 9.25%, 40/30 loan with 2.5 points *after* the adjustments for whatever increased risk that Quicken incurred from the recently late Citifinancial monthly mortgage payment, which mortgage was pending payoff. Consistent with Quicken's incentive plan, which compensates loan agents for adding phantom points, Johnson then charged a discretionary 1.5 additional points or $2,100 above final, standard pricing without any corresponding interest rate reduction.

But, here, Quicken went a step beyond taking advantage of an unsuspecting consumer or mislabeling pure profit as a service. It affirmatively misrepresented the charge as an interest rate buy-down. The fact that Johnson afterwards shared her misrepresentation with a co-worker, noting Ms. Jefferson "knows she is buying the [interest] rate way down," confirms that this misrepresentation was material to Ms. Jefferson. *See*, PL Ex. 4 at Q2647 (A1819). Moreover, prior to the misrepresentation, Johnson noted that when "I give her the final numbers she prob[ably] won't want any of us" and "I am hoping she doesn't run like last time." PL Ex. at Q0002663 (A1835), 2666 (A1838). But, yet again, a well-trained Johnson was able to make Ms. Jefferson "excited" about the Loan. *See id.* at Q0002676 (A1848).

A matter is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." Restatement Second, Torts § 538 (2010). Spending $2,100 is a material act to most anyone in West Virginia. Here, had Quicken been forthcoming about the fictitious "loan discount," Ms. Jefferson, who earned less than $2,500 per month, would have put an additional $2,100 in her pocket by avoiding this opportunistic and discretionary premium. Therefore, this is not "mislabeling" but systematically "overcharging" on a wide scale. Plain and simple, Ms. Jefferson paid for an interest rate discount that she did not receive. Thus, the "loan discount" that Ms. Jefferson unnecessarily paid to Quicken was material.

In addition to materiality, Quicken argues reliance. However, Quicken did not preserve this issue for appeal. In its post trial motions, Quicken argued only materiality. For this reason, the Court should decline to hear the issue. All the same, Ms. Jefferson plainly relied on this misrepresentation in gratuitously paying the $2,100 windfall to Quicken. She even showed excitement, as recorded in Johnson's e-mail. *Id.* Because the trial court determined the Loan, as a whole, should be declared unenforceable, it was unnecessary to separately award the $2,100 procured through this fraud. Nevertheless, Quicken's "discount points" were fraud.

III. The Trial Court Had Discretion To Hold This Unconscionable And Fraudulent Loan Unenforceable As A Matter Of Law

The trial court determined the Loan, specifically the Note and Deed of Trust, are "unenforceable as a matter of law" consistent with the remedies provided under § 46A-2-121, §46A-6-106 and common law fraud. The trial court further "canceled" the loan obligation under § 31-17-17(a); therefore, declaring the Note and Deed of Trust "void." Quicken contests the trial court's authority to order such relief.

A. The Consumer Credit and Protection Act

Respondents submit that § 46A-2-121 clearly and unambiguously authorized the trial court's remedy in this matter.

> (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:
>
> (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, *the court may refuse to enforce the agreement*, or
>
> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, *the court may refuse to enforce the agreement*, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

W.Va. Code § 46A-2-121(1)(emphasis supplied). The crux of Quicken's argument is that the trial court's application of § 46A-2-121 in holding the Loan unenforceable cannot be reconciled with W.Va. Code § 46A-5-105, which provides

> If a creditor has willfully violated the provisions of this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, in addition to the remedy provided in section one hundred one of this article, the court may cancel the debt when the debt is not secured by a security interest.

Quicken builds its argument almost exclusively on *Byrd v. Option One Mortgage Corp.*, No. 2:04-1058 (S.D.W.Va. Apr. 12, 2007), an unpublished, federal district court opinion which overlooks two dispositive decisions from this Court.[8] Petitioner further relies on misquoted language from *Bolen*, 188 W.Va. 687, 425 S.E.2d 829. *Byrd* is incorrect and *Bolen* is dispositive

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[8] Quicken first mentions *Tomchin Furniture Co. v. Lester*, 172 W.Va. 575, 309 S.E.2d 73, 79 (1983)("We find no provision authorizing cancellation of the debt because of the failure to advise of the right to obtain property and life insurance from someone other than the creditor.") However, *Lester* is limited to a very narrow claim regarding statutory notice of a right to buy credit insurance from third parties opposed to a broad challenge to the making and enforceability of a consumer loan under § 46A-2-121. Naturally, failure to provide such a notice does not render a loan unenforceable.

of Quicken's argument, as it holds that Article 5 simply provides "*additional* damages" to those *self contained* in § 46A-2-121. *See*, *Bolen*, 188 W.Va. 687, 425 S.E.2d 829, Syl. Pts. 2 & 4.

Nevertheless, it's appropriate to begin with *Byrd*. West Virginia Code § 46A-5-105 by its own terms supplements the remedy provisions of W.Va. Code § 46A-5-101 and in no way limits any remedy under the Act (*i.e.*, the statute does not state "Only if a creditor ..."). *Byrd* recognized as much and begins with § 46A-5-101(5), which states "except as otherwise provided, a violation of this chapter does not impair rights on a debt." It is, here, where *Byrd* takes a wrong turn. *Byrd* overlooks the fact that the unconscionability statute, § 46A-2-121, expressly gives the court the power to "impair rights on debts" by refusing to enforce "consumer loans" or any part thereof.[9] This Court has approved of the use of this statutory power for many years in a variety of contexts. *E.g.*, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2003) (arbitration clause in consumer debt agreement unenforceable); *U.S. Life Credit Corp. v. Wilson*, 171 W.Va. 538, 301 S.E.2d 169 (1982) (waiver of consumer rights in debt agreement was unconscionable). It is clear that § 46A-2-121 "otherwise provides" for the impairment of "rights on debts," as that term is used in § 46A-5-101(5).

Accordingly, § 46A-2-121 can truly be read *in pari materia* with § 46A-5-105 without inventing a mythical and problematic tender-of-principal requirement and without limiting remedies provided for in the WVCCPA. As it stands, courts are free to fashion any number of remedies, whether minor or severe, under § 46A-2-121 on a case-by-case basis.

All the same, Respondents submit that the remedy provisions of § 46A-2-121 need not be read *in pari materia* with Article 5. Two of the Court's opinions make that point clear. In *U.S. Life Credit Corp.*, 171 W.Va. at 542, 301 S.E.2d at 172, the Court confirmed that § 46A-2-121

[9] Both § 46A-5-101(5) and § 46A-2-121 were part of the original enactment of Chapter 46A in 1974; both were amended and reenacted in 1996. §46A-5-105 was a late addition to the Act in 1994.

(along with other enumerated sections of the Act) has a "self-contained remedy" and held that Article 5 remedies are both separate from and in addition to the "self-contained remedy" for unconscionability. The conclusion that Article 5 simply provides "*additional* damages" to those "self contained" in § 46A-2-121 was later formalized in the Court's syllabus in *Bolen.*[10] Thus, the district court's conclusion in *Byrd* that "§ 46A-2-121 authorizes nothing more than is allowable under § 46A-5-101" is directly contradicted by this Court's decisions in *U.S. Life Credit Corp.* and *Bolen.*[11]

Because the Legislature, in adopting § 46A-5-105, was simply adding another remedy to Article 5, which applies broadly to most all violations of Chapter 46A, it did not intend to intrude on the more specific, "self contained" remedies codified in § 46A-2-121 itself.[12] Likewise, Article 6, governing unfair and deceptive acts and practices, has a self contained remedy codified in W.Va. Code § 46A-6-106(a). A consumer "may bring an action . . . to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary or proper." § 46A-6-106(a). Here, again, § 46A-5-105 could in no way limit the trial court's discretion to provide equitable relief. Similarly, §46A-5-105 does not limit a consumer's remedies for common law fraud. *See, Casillas v. Tuscarora*

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> 2. W.Va. Code § 46A-5-101 outlines the types of *additional* damages that may be recovered for various violations of Chapter 46A, and specifies illegal, fraudulent or unconscionable conduct.
>
> 4. Under W.Va. Code § 46A-5-101, the additional *damages* for fraud or unconscionable conduct are limited to actual damages and, if the court so determines, a penalty of not less than one hundred nor more than one thousand dollars. Consequently, *punitive damages are not available* under the fraud or unconscionable conduct provisions of W.Va. Code, 46A-2-121 [1974].

Bolen, 188 W.Va. 687, 425 S.E.2d 829, Syl. Pts. 2 & 4 (1992) (emphasis supplied).

11 Respondents' reading of § 46A-5-105 does not render it "superfluous." For example, before § 46A-5-105, the only relief for a willful violation of the illegal balloon note statute was actual damages, if any, and a civil penalty under § 46A-5-101. After the passage of § 46A-5-105, unsecured balloon notes may be canceled.

12 The "general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to same subject matter where the two cannot be reconciled." Syl. Pt. 4, *In re Chevie V.*, 226 W.Va. 363, 700 S.E.2d 815 (2010)(citation omitted).

Land Co., 186 W.Va. 391, 394, 412 S.E.2d 792, 795 (1991) ("defenses of the WVCCPA are not available . . . under the common law action"). For the forgoing reasons, the unpublished holding of *Byrd* is contrary to both statutory and common law.[13]

B. Statute Prohibiting Loans in Excess of Property's Fair Market Value

The Court also voided or canceled the Loan under § 31-17-17(a). Quicken challenges the trial court's authority and misconstrues its factual findings regarding the requirement of intent.

§ 31-17-17. Loans made in violation of this article void; agreements to waive article void

> (a) If any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan may be cancelled by a court of competent jurisdiction.

Yet again, Quicken argues that this Court should legislate some vague tender obligation into the statute, despite the fact that its interpretation of Chapter 31 is inherently contradicted by its interpretation of Chapter 46A. In discussing § 46A-5-105, Quicken concedes that the word "cancel" means the entire debt, including principal, and argues that remedy is reserved for unsecured debts. *See*, Petitioner's Brief at 24-25. Having been confronted with a similar statute that by its terms applies to mortgage loans, Quicken's already flawed arguments become unworkable and, here, unsupported by any authority. *Cf.*, *Bailey v. Branch Banking & Trust Co.*, 2011 WL 2517253 (S.D.W.Va. 2011) ("jury's decision on these claims [subject to cancellation under Chapter 46A] will directly impact whether he is obligated to pay the principal and interest on his credit card").

[13] Should the Court determine that the trial court does not have authority to void this Loan, or that the void Loan, or any part thereof, cannot be included for punitive damage ratio purposes, then Respondents respectfully submit that the trial court should be given an opportunity to award in the alternative damages under § 31-17-17(c), § 46A-5-101(1), § 46A-6-106 and/or common law fraud. As demonstrated herein, Respondents were certainly harmed by this predatory loan and that harm should not go uncompensated nor should Quicken's malicious conduct go unpunished.

Essentially, Quicken argues that canceling a loan obligation does not mean voiding the obligation but means rescission of the loan, which would require repayment of principal. This interpretation is at odds with the very title of the statute – "Loans made in violation of this article void." Nor would the Legislature omit something of such significance (and logistical complexity) as repayment of the loan principal when providing for canceling of a loan. Furthermore, the Legislature knows how to limit consumer remedies to interest when it so intends. W. Va. Code § 47-6-6 provides that "[a]ll contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is permitted by law *shall be void as to all interest* provided for in any such contract or assurance." *Id.* (emphasis supplied). The absence of such qualifying language, here, is instructive of the legislative intent. Accordingly, this loan was properly voided under § 31-17-17(a).

Quicken also distorts the trial court's conclusions as to the multistep appraisal process. With respect to the act of providing an estimated value in the ordering of the appraisal, the trial court found Quicken's intent or "purpose" was "to inflate the true value of the property." 2/25/10 Op. at ¶ 50 (A135). Quicken is correct that the trial court found only negligence as to the manual appraisal review step. *Id.* at ¶¶ 57-59 (A136-139). However, as to the overall approval and use of the appraisal, the trial court found "sufficient evidence that the appraisal was not *bona fide*, including: . . . several indications that the appraisal was grossly inflated within the loan file itself." *Id.* at p. 23 (A148); *see also*, *supra* at 13. In these regards, the trial court later explained its conclusions:

> Where I am concerned is, on Item 5, where the mortgage loan between Quicken and the Plaintiffs exceed the fair market value of the property, and then the Defendant cannot meet its burden of proving the appraisal was bona fide. And it made an independent appraisal, or it was prepared in compliance with USPAP, and that is what I am talking about.

> And there was no finding there, that that was done negligently and, basically, really was the basis of enjoining Quicken from collecting any future payments under the loan.

Phase II at 118 (A2433). Accordingly, the trial court's findings were not limited to negligence. Willfulness has been established permitting the cancelation of the Loan.

IV. The Punitive Damage Award Was Well-Supported And Satisfied Due Process

A. Predicate Authority

The parties agree common law fraud is a proper predicate for a punitive damage award. The merits of the fraud claim were discussed above. In addition, a violation of W.Va. Code §31-17-1, *et seq.* may serve as the predicate cause of action for a punitive damage award. Quicken does not argue to the contrary and simply reiterates its position that no willfulness finding was made with respect to the appraisal.[14] This argument was also addressed above.

B. Quicken Loans was Afforded Procedural Due Process

Despite receiving a full evidentiary hearing, and a full opportunity to brief the *Garnes* issues post hearing, Quicken claims it was denied procedural due process merely because the trial court did not write a sufficiently detailed order. Respondents wanted more detail in the February 17, 2011 Order, as well, because they wanted to show this Court the full reprehensibility of Quicken's conduct. Nonetheless, the trial court determined that the record was sufficient, and its Order of February 17, 2011 does not stand alone. The trial court's initial 26-page Order of February 25, 2010, with its Findings of Fact and Conclusions of Law, must also be considered. *See*, Memorandum of Opinion and Order at FN 3 (Feb. 17, 2011) (incorporating previous Order) (A311). These two orders, taken together, are more than adequate to satisfy the procedural due process requirement. Furthermore, this Court is free to

[14] To the extent Quicken may later attempt to raise this dispute, or the Court is otherwise interested, Respondents refer the Court to Plaintiffs' Reply to Quicken's Post-Hearing Memorandum on Attorney's Fees and Punitive Damages at 13-15, filed on Oct. 1, 2010 (A265-267).

consider the very same record that the trial court had, together with, the extensive briefing in the trial court on punitive damages, in its review.[15] Accordingly, any error is harmless inasmuch as Quicken's egregious conduct, if anything, would have supported a substantially larger award.

C. The Punitive Damage Award was Justified

"Petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." Syl. pt. 5, *Garnes*, 186 W.Va. 656, 413 S.E.2d 897. Under this standard, Quicken has preserved, at most, three issues: (1) reprehensibility; (2) whether the void loan can be included in the ratio analysis; and (3) whether attorney fees can be included in the ratio analysis. The last two issues are addressed separately below.

The circumstances here warrant a substantial award of punitive damages. Under the *Garnes-Perrine* analysis, a multitude of aggravating factors is present. Importantly, we are not dealing with gross negligence or even recklessness on Quicken's part. Instead, Quicken "crossed the line from reckless disregard of an individual's rights to willful, mean-spirited acts." *Vandevender v. Sheetz, Inc*, 200 W.Va. 591 606, 490 S.E.2d 678, 693 (1997). Unfortunately, Quicken is characterized by a culture of fraud, trickery and deceit—encouraged by management and practiced on a grand scale by the rank and file. The trial court's conclusions of fraud are worth repeating:

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[15] *See*, Plaintiffs' Post Trial Brief Regarding Punitive Damages filed on Sept. 24, 2010 (A165) and Plaintiffs' Reply to Quicken's Post-Hearing Memorandum on Attorney's Fees and Punitive Damages at 16-22, filed on Oct. 1, 2010 (A268-274). Quicken's main brief and reply brief are also in the record at A198 & A298.

(a) Intentionally promising Lourie Jefferson it would refinance her within 3 to 4 months from the date of the closing and get her into a more affordable loan upon which she reasonably relied to her detriment in accepting the loan. Quicken had no intent at the time this misrepresentation was made of refinancing Mrs. Jefferson. Instead, the misrepresentation was made to prevent Mrs. Jefferson from walking away from the loan.

(b) Representing to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a "loan discount" on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken; and

(c) Not disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment and then not properly disclosing the balloon payment amount and due date at closing.

2/25/10 Op. at pp. 21-22 (A146-147). This fraud was motivated by profit. The institutional directive was clear – say and do whatever is necessary "to close loans." The institutional goal was likewise clear – make as much as possible up front and sell these loans as fast as possible so as not to get "stuck with loans." While Quicken failed to sell this Loan, its intent to pass the buck was crystal clear when it was revealed that Quicken was still trying to dump the Loan on the open market even *after* it obtained a legitimate appraisal of the Property.

Furthermore, this Court should not allow Quicken to scapegoat Johnson. Johnson's involvement was merely at a low level and she was not responsible for: (1) training loan agents to make forward-looking statements; (2) implementing incentive plans that motivated employees to bilk consumers into paying premiums for their loans and/or borrowing more than is legal; (3) representing premiums or pure profit as interest rate discounts on HUD Settlement Statements; (4) failing to have procedures in place to systematically send out revised Good Faith Estimates when significant changes are made to a loan; (5) drafting the Note without the crucial disclosure of the amount of the balloon; or (6) systematically tipping off appraisers. Moreover, Johnson was only doing what she was trained and incentivized to do, and what Quicken usually does.

As Quicken's attorney stated in opening statement, "[f]rankly, what you will hear is that this was a loan, like many – there was nothing unusual about this loan..." *See*, Vol. IV at 36-37 (A1059-1060) (Opening Statement). In that chilling comment lies an admission that this Loan was business as usual for Quicken. What is not typical of Quicken is making amends with the vulnerable consumers it has harmed. Quicken declined to make a single offer of settlement prior to the trial court's decision of February 25, 2010. *See*, Phase II at 171-172 (A2446) (Nuckolls); PL Post Trial Brief Regarding Punitive Damages at 6 (A170). Instead, it chose to contest any and all forms of relief, even the foreclosure injunction, and denied any and all responsibility and liability at trial.

In the end, capitalism only flourishes when tempered by morality, or at a minimum, the rule of law. Here, Quicken's conduct represented not capitalism, or aggressive business practices, but rather the belief that it is law unto itself. Quicken's conduct should be both punished and deterred. "[T]o accomplish punishment and deterrence for ... a wealthy company, a punitive damage award must necessarily be large." *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 555, 694 S.E.2d 815, 888 (2010). Given Quicken's financial wherewithal, the trial court showed considerable restraint in its award. *See*, PL Ex. 57 (A2455 - note error in Table of Contents) and Phase II at 131-135 (A2436-2437) (Saunders) for a summary of Quicken's financial condition.

For these reasons, the trial court's award was both fair and constitutional under *Garnes*. In its *TXO* ratio calculation, the trial court included the $227,000 loan balance and the $495,956.25 fee award in the denominator. Both were appropriate.

1. It is appropriate to include the void loan in the punitive damage ratio

The trial court determined the Loan was void under § 46A-2-121, § 46A-6-106, § 31-17-17(a) and common law fraud. The trial court incorporated the $227,000 balance of the Loan, which includes approximately $144,000 in principal and $83,000 in accrued interest, late charges and other fees[16], in its punitive damage ratio analysis. Quicken argues that it is improper as a matter of due process to include the $144,000 principal balance for ratio purposes. Quicken was silent as to the $83,000 in accrued finance charges.

First, Quicken correctly recognizes that the "relevant bench mark is the harm" to Respondents. But Quicken takes a narrow and cynical view of harm when it argues Respondents were not "harmed by receiving $144,800." Fortunately, the law is not so narrow-minded.

In a consistent line of cases, the Supreme Court of the United States has held that courts may consider both the *actual* harm and the *potential* harm in performing the ratio analysis. *See e.g., State Farm Mut. v. Campbell,* 538 U.S. 408, 424 (2003) (noting that the relevant ratio is "between harm, or potential harm, to the plaintiff and the punitive damages award"); *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993) ("it is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded"). Likewise, this Court observed in Syllabus point 1 of *Garnes*, in part, that "[p]unitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." 168 W.Va. 656, 413 S.E. 2d 897.

This is exactly what the court did in *Vasquez-Lopez v. Beneficial Oregon, Inc.,* 152 P.3d 940 (Or. 2007). Like this case, *Vasquez* arose out of a predatory lending scenario. Unlike this

[16] *See*, Phase II at 124-125 (A2434-2435) (Saunders); PL Ex. 53, Q3486 (A2454). Quicken never challenged Saunders' opinion concerning the value of the loan, which came from Quicken's own records. To be precise the balance as of June 17, 2010 was $227,626.96, which included $144,313.05 in principal; $151.56 in late charges; $49,109.29 in other fees and $34,053.06 in accrued interest. Here, the trial court rounded down.

case, however, the plaintiff in *Vasquez* was able to avoid the consequence of the predatory loan through refinancing. Accordingly, it was unnecessary for the court to exercise its authority to void the loan. Nevertheless, in performing its ratio analysis, the trial court considered the potential harm to the plaintiffs. The court concluded that "the appropriate figure for potential damages is $326,751.57, the amount of interest [the lender] would have earned over the life of the loan." 152 P.3d at 958. *See also, Mitchell v. Fortis Ins.* Co., 686 S.E.2d 176 (S.C. 2009)(in a bad faith case involving termination of a health insurance policy, the maximum amount the insurer would have paid out in lifetime health benefits was treated as "potential harm").

This matter is even more compelling than *Vasquez.* Whereas the harm in *Vasquez* was merely potential, the harm to the plaintiffs here was quite real because they were saddled with an illegal loan that could not be refinanced. Thus, in determining the harm suffered by the Respondents, it is appropriate for this Court to consider the amount of interest that was payable over the life of the loan. Here, the trial court found the total finance charge for this loan was $520,065.61. *See*, 2/25/10 Op. at ¶ 45 (A134). Taking this figure alone, the ratio is a constitutionally permissible 4.17 to 1.[17]

Alternatively, the trial court considered the balance of the voided loan. After all, the balance of the voided Loan includes accrued finance charges and prohibits future interest from accruing. The trial court was simply being more conservative in its approach than the

[17] *See*, Syl. Pt. 15, *TXO*, 187 W.Va. 457, 419 S.E.2d 870 (setting the outer limit of the ratio for cases involving "extreme negligence or wanton disregard" to 5 to 1). This case is not one of extreme negligence or wanton disregard. In fact, the circuit court made express and pervasive findings of fraud. Thus, the 5 to 1 limit established in *TXO* is not applicable to this case. In *Sheetz*, the Court likened a plaintiff's wrongful retaliation claim to claims of "fraud, trickery or deceit" that are deserving of larger awards of punitive damages and upheld a ratio of 15-1. 200 W.Va. at 606, 490 S.E.2d at 693. Because Quicken fully embraced "fraud, trickery and deceit," ratios above 5-1 are permissible. For a detailed discussion of the same and survey of this Court's relevant opinions, see Plaintiffs' Post Trial Brief Regarding Punitive Damages at 16-20 (A180-84) and Plaintiffs' Reply to Quicken's Post-Hearing Memorandum On Attorney's Fees And Punitive Damages at 16-19 (A268-71).

Vasquez court by selecting the lower of two appropriate figures. Besides, the value of the voided loan may be included as part of the ratio because it represents the amount of illegal, unconscionable, and fraudulent debt the Respondents were compelled to shoulder as a result of Quicken's misconduct, which amount has now been awarded to Respondents as damages.

Quicken also characterizes the void loan as punitive, and for that reason urges this Court not to count it. However, refusing to enforce an illegal, unfair, deceptive, unconscionable and fraudulent debt is in no way punitive. In doing so, the trial court provided an appropriate remedy that addressed the vast inequities of this transaction, including: the $107,000 concealed balloon payment; the excessive and fraudulent closing costs; a principal loan balance that was $98,800 over its legal limit (*i.e.*, the fair market value of the residential property it was secured by); and an increase of $349,000 in finance charges to Ms. Jefferson after refinancing with Quicken. Thus, the Loan was an actual harm to the Respondents and the remedy was compensable.[18]

Next, Quicken in a roundabout way argues that equitable relief cannot be considered for ratio purposes, but does not cite any case holding as much. Instead, Quicken attempts to twist a rarely cited, ninety-year-old case discussing the parameters of equitable jurisdiction and a few more-recent cases merely discussing in abstract the nature of certain remedies to make its argument. However, courts that have considered the issue Quicken presents have been willing to include equitable relief in the ratio. *See e.g.*, *Martin v. Texas Dental Plans, Inc.*, 948 S.W.2d 799 (Tex. App. 1997) (recognizing that equitable relief may be considered for ratio purposes where the fact finder has assigned a value to that relief); *Gagnon v. Continental Cas. Co.*, 260 Cal.Rptr. 305, 309 (1989)("[w]ith the focus on the plaintiff's injury rather than the amount of

[18] Quicken's reliance on *Perrine*, 225 W.Va. 482, 694 S.E.2d 258, is also unavailing. *Perrine* held that punitive damages were unrecoverable in medical monitoring cases because the plaintiffs did not have a present harm, but only a risk of harm in the future. Here, the Respondents were, in fact, harmed the moment Quicken compelled them to sign an illegal note and a mortgage securing it.

compensatory damages, the [ratio] rule can be applied even in cases where only equitable relief is obtained"). In any event, the emphasis for ratio purposes is not the remedy, but the harm, even to include potential harm.

Quicken's argument also overlooks the all-important fact that Respondents prevailed on five legal claims against Quicken, including four statutory claims and their common law fraud claim. The fact that the trial court's remedy of choice may have been one that was also available in the old courts of equity changes nothing. The claims asserted by the Respondents herein were legal and, as a result of those claims, the trial court held the Loan unenforceable as a matter of "*law*" – not *equity*. Finally, this Court has equated the remedy provisions of § 46A-2-121 with compensatory "damages." *See*, Syl Pt. 4, *Bolen, 188 W.Va. 687, 425 S.E.2d 829* (holding § 46A-5-101 provides "additional *damages*" to those self contained in § 46A-2-121).

2. It is appropriate to include attorney fees in the punitive damage ratio

Quicken provides the following summary of its argument: "Because attorney's fees are not compensatory damages, there is neither a legal nor logical basis for the circuit court's [punitive damage] award." Petitioner's Brief, at 36. In reaching this conclusion, Quicken overlooks the purpose and structure of the CCPA and distorts the applicable case law.[19]

To begin with, Quicken makes the broad statement that "attorney's fees do not generally compensate for actual harm to the plaintiff." Petitioner's Brief, at 38. Two cases are cited, but neither of them answers the relevant question. The first case is *Boyd v. Goffoli,* 216 W.Va. 552, 608 S.E.2d 169 (2004). *Boyd* was a common law fraud case where a fee request was made

[19] Quicken also suggests--without citing any authority--that it is improper "to ground punitive damages on statutory attorneys' fees here, because the statute to which the fees were awarded [the WVCCPA] does not authorize punitive damage awards in the first place." Petitioner's Brief, at 36. But this is simply not the law. What Quicken really wants is a separate ratio analysis for each and every claim presented by the plaintiffs. Under *BMW of North America v. Gore*, 517 U.S. 559 (1996), all punitive damage awards must be reviewed, but this review only requires the court to compare the *total amount* of the compensatory award with the *total amount* of the punitive award. There is no requirement for a claim-by-claim analysis.

pursuant to *Sally-Mike Properties v. Yokum*, 179 W.Va. 246, 356 S.E.2d 246 (1986)(authorizing fee awards where the losing party "has acted in bad faith, vexatiously, wantonly or for oppressive reasons"). Quicken also cites *Bartles v. Hinkle,* 196 W.Va. 385, 472 S.E.2d 827 (1996). *Bartles,* however, was a sanction case where attorney fees were awarded as a result of discovery violations. Importantly, neither of these cases addressed an award of fees under the WVCCPA or the Residential Mortgage Lender, Broker and Servicer Act.[20] *See*, W.Va. Code §46A-5-104; W.Va. Code § 31-17-17. Fees awarded pursuant to these statutes are *compensatory* in nature, not punitive. This is so for at least three reasons.

First, the remedial purpose of the WVCCPA must be considered. West Virginia case law makes it clear that the WVCCPA is a broad, remedial statute intended to protect West Virginia consumers and compensate them fully for their losses. *See, e.g., Barr*, 227 W.Va. 507, 711 S.E.2d at 583 (noting that the act's "remedial" purpose is "to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue for relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action"). Second, the compensatory nature of a fee award under the WVCCPA is apparent from its basic structure. Chapter 46A, Article 5 provides for both criminal liability and civil penalties for WVCCPA violations. Fee awards, however, are covered in their own section, § 46A-5-104, which is separate and distinct from the WVCCPA's penalty provisions. Third, case law from other jurisdictions makes it abundantly clear that statutory fee awards made in consumer cases are, in fact, intended to provide compensation to the victims.[21]

[20] The Residential Mortgage . . . Act is a companion statute to the WVCCPA and is similarly aimed at protecting consumers W.Va. Code § 31-17-18 specifically references the WVCCPA and makes it clear that the penalties and remedies codified in Chapter 31 "are not exclusive, but are cumulative with . . . the consumer protection laws in Chapter 46A of this code."

[21] *See, Jordan v. Transnational Motors, Inc.*, 537 N.W.2d 471, 473(Mich.Ct.App. 1995)(one of the purposes behind Michigan's consumer law "is to provide, via an award of attorney fees, a means for

Given the nature of the WVCCPA, the fees awarded here were intended by the Legislature to compensate consumers for having to retain an attorney and pursue their statutory remedies. Nevertheless, Quicken argues that "courts have consistently refused to count attorneys fees as compensatory in calculating the permissible ratio of compensatory to punitive damages." Petitioner's Brief at 37. This is a gross misreading of the case law. In fact, Quicken only cites three unremarkable cases as support for this allegedly "consistent" refusal.

Quicken's flagship case is *Campbell v. State Farm Mut. Automobile Ins. Co.,* 98 P.3d 409 (Utah 2001). Following remand, the plaintiff in *Campbell* asked to have the attorney fees treated as compensatory damages for ratio purposes. The state court refused, citing the United States Supreme Court's opinion in *Campbell,* 538 U.S. 408. This was an odd citation, to be sure, because the issue of attorney fees *was neither raised nor decided* by the Court. Furthermore, the state court did not have the benefit of the cases cited herein establishing a clear majority rule to include attorney fees. *See, e.g., Blount v. Stroud,* 915 N.E.2d 925, 943 (Ill. Ct. App. 2009).

In any event, *Campbell* is missing an essential element for including attorney fees in the ratio. The cases cited by the Respondents herein rely on a *statutory* award of fees. It is the public policy underlying the statutory scheme that justifies including fees in the ratio. In *Campbell,* the fees were not granted by virtue of any statute. *See, Campbell v. State Farm Mut.*

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consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints"); *Jones v. General Motors Corp.*, 953 P.2d 1104, 1109 (N.M. 1998)(noting that the purpose of awarding fees under New Mexico's consumer law is, inter alia, "to reimburse the individual plaintiff and his counsel for enforcing the act"); *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000)(the purpose of an award of fees under Kentucky's consumer law is "to compensate the prevailing party for the expense of bringing an action under the statute"); *Parker v. INF Insulation Co.*, 730 N.E.2d 972, 978-979 (Ohio 2000)(the purpose of Ohio's consumer law is to make private enforcement available to consumers "who otherwise might not be able to afford or justify the costs of prosecuting an alleged...violation"); *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 584 (Va. 2003)(whereas punitive damages "are designed to punish offensive or unlawful conduct," the fee-shifting provisions of Virginia's consumer law "are designed to encourage private enforcement of the provisions of the statute"); *Gordan v. Archer*, 1999 Mass.App.Div. 154 (1999) (fees under consumer protection statute construed as strictly compensatory in nature).

Automobile Ins. Co., 65 P.3d 1134, 1168 (Utah 2001) ("the Campbells do not argue here, nor did they below, that a statute or contract authorizes them to recover attorney fees"). Thus, *Campbell* is easily distinguishable.[22]

Because the fees here were awarded under consumer protection statutes, they are compensatory in nature and may properly be included in the ratio analysis. This issue was thoroughly addressed by a federal appeals court in *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005). In *Willow*, the plaintiff sued its own insurer for bad faith in handling a property damage claim. The plaintiff prevailed and was awarded $135,000 in attorney fees and costs. No other compensatory damages were awarded as part of the bad faith litigation. The plaintiff also was awarded $150,000 in punitive damages. The appeals court held that the attorney fee award was compensatory in nature. Fee shifting was a part of Pennsylvania's statutory scheme--a way of furthering its public policy requiring insurers to "deal fairly…when their insureds submit claims in good faith." 399 F.3d at 235-36. Awarding fees to successful litigants "vindicate[s] the statute's policy by enabling plaintiffs such as Willow Inn to bring…actions alleging bad faith delays [and] to secure counsel on a contingency fee." *Id.* at 236. Thus, the court concluded, "attorney fees and costs awarded pursuant to [Pennsylvania's bad faith law] are compensatory damages for…ratio purposes." *Id.* at 237.

The court in *Blount,* 915 N.E.2d 925 applied a very similar analysis in a statutory civil rights case. *Blount* noted that awarding fees in civil rights cases is remedial, not punitive: citing *Willow,* the court had no difficulty concluding that the fees served a compensatory purpose and, thus,

[22] The two remaining cases cited by Quicken fare no better. Quicken first cites *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. Cir. 2003), an employment case. The court's discussion of the fee issue in *Daka* was dicta and was relegated to a footnote. The other case cited by Quicken is *Parrish v. Sollecito*, 280 F.Supp.2d 145 (S.D.N.Y. 2003). The court's analysis in *Parrish* consisted of a single sentence, and it cited no authority for the proposition that attorney fees by their nature "include a certain punitive element." *Id.* at 164. Furthermore, as in *Campbell*, the courts in *Daka* and *Parrish* did not have the benefit of the well-developed line of cases cited by the Respondents herein.

"should be counted on the compensatory side of the...ratio." *Id.* at 944-945 (citation omitted).[23] Importantly, *Blount* canvassed cases from across the country and concluded that its decision was in line with the majority:

> We further note that the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the *Gore* analysis. *See, e.g.*, . . . *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996); . . . Indeed, as the Tenth Circuit pointed out, nothing in *Gore* prohibits consideration of the costs incurred by the plaintiff in bringing the legal proceedings to vindicate rights as part of the "actual harm" suffered. *Continental Trend Resources,* 101 F.3d at 642.

Id. at 943-44. *See also*, *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 Fed. Appx. 424 (3rd Cir. 2007)(another Third Circuit case affirming a $4,500,000 punitive damage award using a $1,100,000 attorney fee in its ratio analysis); *Diviney v. Nationsbank of Texas, N.A.*, 225 Bank.Rptr. 762, 777 (10th Cir. 1998)(in a bad faith banking case, the court held that "the costs of litigation to vindicate rights may be considered in determining the constitutional limits on the size of a punitive damage award"); *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007)(finding attorney fees to be "compensable in nature" and including them "as part of the measure of actual damages for the necessary comparison"); *In Re USA Commercial Mortgage Co.*, 2011 WL 2847505, *32 (D.Nev. 2011)("[i]n calculating the ratio between the plaintiffs' actual or potential harm and the jury's punitive damages awards, the court includes the jury's compensatory damages awards, as well as the court's post trial awards of prejudgment interest and attorneys' fees, costs, and expenses").

[23] *Blount* recognized that there were other, equally valid reasons for considering attorney fees and other litigation costs as an element of compensatory damage when calculating the compensatory/punitive ratio. For example, a wealthy defendant can take unfair advantage of its resources by "mount[ing] an extremely aggressive defense." Awarding attorney fees makes it possible for civil rights victims to obtain counsel who are willing to fight against these well-funded opponents. Furthermore, giving an award of fees is realistically the only way "to make the plaintiff whole." 915 N.E.2d at 943.

The rationale of these cases applies with the same vigor here. Fees in cases brought under the WVCCPA are part of a remedial statutory scheme intended to provide protection to West Virginia consumers. Without fee shifting, victims of consumer fraud would be unable to retain attorneys to represent them and prosecute their claims. This is particularly so in light of the fact that those who perpetrate consumer fraud, like Quicken, are often large, well-funded corporations. Awarding fees to consumers who successfully litigate their claims is a form of additional compensation—not only providing a level playing field, but also insuring that consumers are, in fact, made whole.[24]

V. Any Settlement Offset Is Waived

On February 17, 2011, the trial court entered judgment in this matter. Quicken timely filed various post trial motions, which were later denied, but did not include a motion seeking an offset against the judgment for settlement amounts paid by Guida. The motion for offset was filed separately on April 8, 2011, some 50 days after the entry of judgment. *See*, Motion for Offset of Judgment (A340). Perhaps, recognizing it was tardy, Quicken never brought the motion on for hearing and, therefore, the trial court did not reach the motion.

A motion for offset of judgment is by its nature a motion to alter or amend a judgment. W.Va. Rule of Civil Procedure 59(e) provides that "[a]ny motion to alter or amend judgment shall be filed not later than 10 days after entry of judgment." Here, the motion was filed 40 days too late. The motion was untimely and any offset is waived. Thus, the issue Quicken seeks to raise, here, is defaulted. Furthermore, even if this were a viable issue, Quicken could not meet

[24] Quicken also suggests that the fee provisions in the WVCCPA are not compensatory because the court has "discretion to decline to award fees." Petitioner's Brief, at 39. But this is a *non sequitur*. Vesting the trial court with discretion does not destroy the compensatory nature of the fees. In fact, the Supreme Court of Kentucky interpreted its own version of the WVCCPA "to authorize, but not mandate, an award of attorney fees and costs" to the prevailing party. Thus, the decision of whether to award fees was "subject to the sound discretion of the trial judge." That said, the court had no difficulty in concluding that the fees were "intended to compensate the prevailing party." *Alexander*, 28 S.W.3d 303, 305.

the elements of "joint obligation" and/or "single indivisible injury" under *Zando*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

CONCLUSION

Because Quicken cannot meet its burden of showing factual or legal error on the part of the circuit court, the judgment in favor of Lourie Jefferson and Monique Brown should be AFFIRMED. Further, Respondents should be awarded attorney fees for defending this appeal under § 46A-5-104 and § 31-17-17.

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and
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Appellees

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CERTIFICATE OF SERVICE

Service of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO QUICKEN LOANS, INC.'S PETITION FOR APPEAL was had upon the Petitioner herein by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 21st day of October, 2011, to the following:

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BRIEF FILED
WITH MOTION

No. 11-0910

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and **MONIQUE BROWN,**

Plaintiffs below,

Respondents.

(From the Circuit Court of Ohio County, No. 08-C-36)

REPLY BRIEF OF PETITIONER QUICKEN LOANS, INC.

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INTRODUCTION

As shown in Quicken Loans' opening brief, the Circuit Court erred in both its liability findings and in the extraordinary and impermissible remedies it imposed. Its finding of unconscionability completely ignored the requirement of *substantive* unconscionability, and its finding of fraud was unsupported by evidence on multiple required elements of fraud, let alone by the necessary clear and convincing evidence. Further, the Circuit Court exceeded its authority in ordering the forfeiture of even the principal amount of the loan at issue. And the court's imposition of over $2 million in punitive damages—more than 100 times the compensatory damages—was made without even a perfunctory analysis of the required *Garnes* factors, and is unsustainable under either West Virginia law or the U.S. Constitution.

The arguments advanced by Plaintiffs in their effort to salvage the extraordinary windfall provided to them by the Circuit Court are all contrary to the record, contrary to established law, or both.

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE LOAN TO PLAINTIFFS WAS UNCONSCIONABLE.

Unconscionable contracts are – and should be – rare animals. As the classic definition of unconscionable contracts described them, they are "'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other[.]'" *Brown v. Genesis Healthcare Corp.*, --- W.Va. ----, --- S.E.2d ----, 2011 WL 2611327, at *-- (June 29, 2011) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750)). Unconscionable contracts reflect an "overall and gross imbalance, one-sidedness, or lopsidedness in a contract," *id.* at *--, and the contract must be so one-sided "'as to lead to *absurd* results.'" *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 603, 346 S.E.2d 749,

752 (1986) (emphasis added; quoting syl. pt. 2, in part, *Ashland Oil, Inc. v. Donahue*, 159 W.Va. 463, 223 S.E.2d 433 (1976)).

In its opening brief, Quicken Loans demonstrated that the loan brought immediate and substantial benefits to Ms. Jefferson that belie unconscionability. She received lower monthly payments, a better interest rate, and a large cash payout that she promptly put to good use, paying off high-interest debts and getting a new automobile. Just as the trial court failed to weigh these undisputed benefits against the costs of the loan, Plaintiffs likewise fail to balance the benefits and costs, as would be required to show that the loan is absurdly one-sided. Plaintiffs also ignore the recent case in which Judge Copenhaver held that a loan is not unconscionable under West Virginia law where the plaintiffs received similar benefits to those Ms. Jefferson received here. *See Croye v. GreenPoint Mortg. Funding, Inc.*, 740 F. Supp. 2d 788, 794 (S.D. W. Va. 2010).

Instead, Plaintiffs attempt to avoid the issue altogether by positing that the longstanding rule of *Brown* – under which substantive unconscionability is always essential to setting aside a contract term on that ground – does not apply here because of § 46A-2-121(1)(a)'s "disjunctive" treatment of unconscionable "terms" and unconscionable "inducement." However, this Court long ago put to rest any suggestion that unconscionability under the WVCCPA is any different than that at common law. Indeed, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), took pains to dispel the thought that the WVCCPA had created some freestanding concept of "procedural" unconscionability whereby a contract or a term thereof could be invalidated in the absence of gross substantive inequality in the contract's terms:

> We want to dispel the notion, which appears to have arisen in this case, that there are two distinct issues termed "procedural unconscionability" and "substantive unconscionability," either one of which can invalidate a contract. ... "[T]he question of 'procedural unconscionability' is an essential part of any determination of whether a particular clause or contract is unconscionable. A finding that the transaction was flawed, however, still depends on the existence of

> unfair terms in the contract. *A litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability."*

Arnold, 204 W.Va. at 236 n.6, 511 S.E.2d at 861 n.6 (emphasis added; quoting *Troy Mining Corp.*, 176 W.Va. at 603-04, 346 S.E.2d at 753).

Inasmuch as the word "unconscionable" cannot be divorced from substantive unfairness in the contract, the disjunctive makes sense (as Plaintiffs themselves recognize) only if "induced" by "unconscionable" conduct means induced by *fraudulent* conduct. *See One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) ("[Code 46A-2-121] expressly deals with conduct that is 'unconscionable' which we have *equated* with fraudulent conduct.") (emphasis added). In short, a claim of "unconscionable inducement" is a claim of fraudulent inducement, and Quicken Loans will address Plaintiffs' fraud claims shortly, just as it did in its opening brief.[1]

Furthermore, none of Plaintiffs' purported bases for unconscionability withstands scrutiny.

First, while the Guida appraisal was incorrect, over-appraisal of the property securing a loan does not divest the borrower of his or her vastly lowered interest rate on the consolidated debt or of the benefits of receiving additional funds to (in this case) retire existing debt and purchase a new car. Instead, it deprives the lender of its intended security for the loan, and hence it greatly increases the risk of loss to the lender. That great risk of loss, and the benefits to the borrower, foreclose any notion that an inflated appraisal makes a loan "absurdly" one-sided *in favor of the lender*. None of cases cited by Plaintiffs held otherwise; rather, they simply held

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[1]Plaintiffs' contention that Quicken Loans has waived any challenge to their unconscionable inducement claim is therefore specious. In any event, Quicken Loans responded specifically to each of the trial court's supposed bases for unconscionable inducement. *See* Brief of Petitioner Quicken Loans, Inc. ("QL Br.") at 13-16.

that an erroneous appraisal—along with excessive fees—raised a factual issue on unconscionability that survived summary judgment. *See Herrod v. First Republic Mortgage Corp.*, 218 W.Va. 611, 617, 625 S.E.2d 373, 379 (2005) ("Only when there are no factual disputes in existence can an unconscionability claim under West Virginia Code § 46A-2-121 be determined as a question of law . . . and resolved through summary judgment."); *Bishop v. Quicken Loans, Inc.*, No. 2:09–1076, 2011 WL 1321360, at *5 (S.D.W. Va. Apr. 4, 2011) ("Plaintiffs have also raised a question of fact as to whether the presence of excessive fees and excessive valuation rendered the terms of the December 2006 note unreasonably favorable to Quicken Loans."). Moreover, Plaintiffs ignore the point that there is a separate statute that deals with inflated appraisals, *see* W. Va. Code § 31-178(m)(8), and provides the appropriate remedies for a violation. *See* QL Br. at 15.

Second, the balloon payment was not unconscionable. A "balloon" simply represents the remaining principal of the loan given the payments of interest and principal to date. Here, Ms. Jefferson's note was due in thirty years, but its payments were amortized to eliminate the principal at forty years. Accordingly, on the due date, some of the principal would still be outstanding. Thus, the loan gave Ms. Jefferson a very long time before this payment of principal came due – far longer than is allotted in many other balloon payments – and she could have viewed that (and its *corresponding*, *long-term*, lower monthly payment) as a benefit. As for Plaintiffs' argument that she could not "avoid" the payment, in fact she could have made extra payments of principal at any time and watched the projected final balloon payment dwindle quickly. But because of the amortization schedule in the note, she did not automatically have to do so. A consumer is entitled to find that flexibility an attractive option, and to choose it. Here,

of course, and self-evidently for reasons having nothing to do with the balloon, she could not make even the minimum payments required by the note.

Third, the closing costs charged were all within legal limits and were commensurate with the risk of the loan. Plaintiffs argue that the closing costs could have been lower, but there is no legal basis for their assumption that every borrower is entitled to the best possible deal, and that lenders must take pains to avoid making "too much" money off of a loan. Quicken Loans is a for-profit business, and it is allowed to pursue and make profits.[2] It is constrained, to be sure, by certain statutory boundaries on interest rates and fees – none of which was even remotely approached or transgressed by the loan at issue – and more directly by its many competitors.

II. THE CIRCUIT COURT ERRED IN FINDING THAT PLAINTIFFS PROVED FRAUD BY CLEAR AND CONVINCING EVIDENCE.

Plaintiffs fail to show the clear and convincing evidence required to support their claim of fraud, and for many of the tort's elements, fail to identify any evidence at all.

Plaintiffs continue to rest their fraud case most heavily on the supposed promise of refinancing within "three or four months." *See* Respondents' Brief in Opposition to Quicken Loans, Inc.'s Petition for Appeal ("Pl. Br.") at 17 (the alleged promise was the "primary motivating and facilitating factor" for the loan). However, Plaintiffs fail to prove the existence of the promise, its falsity, its materiality, or their reliance upon it by clear and convincing evidence.

First, the supposed promise is supported only by Ms. Jefferson's own self-serving testimony, and surely one of the primary purposes of the clear-and-convincing evidence standard is to prevent fraud from being so casually proved. Plaintiffs do not dispute the case law establishing that uncorroborated testimony does not satisfy the standard of clear and convincing

[2]These would necessarily include what Plaintiffs call "pure" profits – whatever those may be.

evidence. *See* QL Br. at 17-18 (citing *Merrill v. Dep't of Health & Human Res.*, 219 W. Va. 151, 161, 632 S.E.2d 307, 317 (2006); *Spaulding v. Spaulding*, 87 W. Va. 326, 104 S.E. 604, 606 (1920)). Instead, Plaintiffs contend that Ms. Jefferson's testimony was corroborated, but on examination, the supposed "corroboration" is illusory. Plaintiffs posit that the supposed promise was "consistent with Quicken's own notes, confirming that Ms. Jefferson declined the Loan until the June 6 promise." Pl. Br. at 25. Quicken Loans certainly has loan notes, but they do not identify any promise at all, and Plaintiffs' lone citation is to the trial court opinion, which says absolutely nothing on this point. Indeed, the lack of any documentation supporting this allegation—even though the record included numerous internal e-mails between Quicken Loans employees and e-mails from Ms. Jefferson herself—belies the allegation. *See* QL Br. at 17. Plaintiffs also point to training manuals that permitted mortgage bankers to make "forward-looking statements," but the manuals in no way instruct bankers to make promises, and they certainly prove nothing regarding whether any forward-looking statement—let alone the particular alleged promise—was made here. The only other supposed "corroboration" comes from the lack of testimony by Heidi Johnson—a former employee whom *neither* party called to testify. Of course, the *absence* of testimony corroborates nothing.

Second, Plaintiffs ignore the point that, even if the promise existed, it was far too vague for fraud because there were no "'definitive and ascertainable terms.'" QL Br. at 20 (quoting *Sayres v. Bauman*, 188 W.Va. 550, 554, 425 S.E.2d 226, 230 (W. Va. 1992)). Simply put, there is no evidence – much less clear and convincing evidence – of the terms of the new refinancing that Ms. Jefferson and Ms. Johnson allegedly negotiated, including the interest rate, term, and points, as well as whether there would be a balloon payment (or, absent a balloon, how much

Ms. Jefferson's monthly payments would increase, due to amortizing the loan over 30 years instead of 40).

Third, Plaintiffs fail to show that the alleged promise was false. Even if a clear agreement for refinancing upon definite terms had existed, Ms. Jefferson breached her side of the very deal that she described. Specifically, she did *not* make payments "for three or four months," and hence the condition precedent to Quicken's alleged performance was not met. Plaintiffs' only response is that, after the first two payments, "[t]he next payment was not due until November 1, 2006," and "was not late under the contract until November 17, which is after the four month time frame for refinancing." Pl. Br. at 8 n.3. However, Plaintiffs provide no citation for this allegation, and no explanation of why "late under the contract" is the time that matters for purposes of the alleged promise. The fact remains that Ms. Jefferson did not make payments for four months, as required under her own explanation of the terms of the promise.

Fourth, there is no evidence at all as to fraudulent intent, *i.e.*, that Quicken Loans intended to refuse a refinancing even if the promise were made and Ms. Jefferson had satisfied her end of the alleged bargain. Plaintiffs' only supposed evidence is an opening statement where Quicken Loans' counsel stated that Quicken Loans does not refinance "in *under* four months," Pl. Br. at 26 (emphasis added), but Quicken Loans explained in testimony that it can "refinance a loan *after* the four-month period." Testimony of Anthony Nuckolls, Vol. IV, p. 192-94 (A1098-99) (emphasis added). Accordingly, there was nothing to prevent Quicken Loans from refinancing here after four months, in accordance with the supposed promise. Plaintiffs try to draw support from *Bishop v. Quicken Loans, Inc.*, but in that case, the court did not find clear and convincing evidence of fraud, but only enough evidence to survive summary judgment. 2011 WL 1321360, at *9 (holding that there is "a question of material fact regarding Quicken Loans'

intentions to fulfill the promise at the time it was made"). Here, Plaintiffs were required to do more than present a question of fact, and they failed to do so.

Plaintiffs' other purported bases for fraud also fail. As to the balloon payment, Plaintiffs do not dispute that Ms. Jefferson knew that the balloon existed when she signed the loan documents. Indeed, it was prominently disclosed – in the titles of two documents that Ms. Jefferson signed, and in the text of a third – and she admitted that she noticed it. This fact alone is dispositive because there can be no fraud when the plaintiff knows the truth. *See Martin v. ERA Goodfellow Agency, Inc.*, 188 W. Va. 140, 141, 423 S.E.2d 379, 380 (1992) ("If one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it, and can not get relief against it."). While Plaintiffs complain that there was no "pre-closing" disclosure of the payment, Pl. Br. at 9, this assertion is legally irrelevant because a lack of *early* disclosure is not fraud. In any event, the assertion is factually erroneous because Ms. Jefferson conceded that she received the loan packet containing the disclosures one to two days before the closing. *See* Testimony of Lourie Jefferson, Vol. II, p. 201 (A931). Furthermore, the Circuit Court made no finding of reliance, and Plaintiffs present no evidence in support of such a finding. Plaintiffs argue that the balloon "would not be tolerated by any reasonable person," Pl. Br. at 29, but it plainly was tolerated by Ms. Jefferson, no doubt due to the benefits the loan provided to her. Finally, there is no proof at all of any fraudulent intent with respect to the balloon. Plaintiffs argue that Quicken Loans "disregarded the statute, as well as industry guidelines, by concealing the balloon payment for as long as possible and as much as possible," Pl. Br. at 28, but a statutory disclosure violation does not establish fraudulent intent, given that the balloon was actually and clearly disclosed in the closing documents.

As for the supposed fraud regarding closing costs related to loan discount points, again the amount of closing costs was accurately stated in the closing documents, and there is no evidence that Ms. Jefferson found the description of that amount to be material to her decision to enter into the loan. Plaintiffs object to Quicken Loans' pursuit of "pure profit," Pl. Br. at 29, but neither the law of fraud nor of unconscionability supports Plaintiffs' assumption that a lender is obligated to give a borrower the *most* advantageous deal that the lender can conceivably provide. Plaintiffs argue that the reliance issue was not preserved for appeal, but Quicken Loans clearly raised the issue in the trial court. *See* Reply Brief in Support of Defendant Quicken Loans Inc.'s Motions For Amendment of Findings of Fact and/or Conclusion of Law at 5 (Apr. 5, 2011) ("Ms. Johnson's *knowledge* of this [alleged discount rate] representation is wholly different from *reliance* on the representation, and the document provides no evidence of the latter, let alone clear and convincing evidence."). Thus, the lack of any finding or evidence on reliance establishes that the fraud claim cannot be upheld.

III. THE CIRCUIT COURT LACKED THE LEGAL AUTHORITY TO FORGIVE THE PRINCIPAL OBLIGATION OF A SECURED DEBT.

Plaintiffs do not dispute that, because the loan at issue is not a "regulated consumer loan," W. Va. Code § 46A-5-101(2), and the debt is "secured by a security interest," *id.* § 46A-5-105, this case does not fall within either of the two specific statutory provisions authorizing the voiding of a loan. Instead, Plaintiffs argue that these specific provisions are somehow irrelevant and collateral to other sections of the West Virginia Code that implicitly allow for forgiveness of the principal of a secured debt. However, basic tenets of statutory interpretation belie this argument.

Plaintiffs primarily assert that unconscionability under § 46A-2-121 is sufficient to forgive Mrs. Jefferson's debt, but § 46A-2-121 does not mention cancellation or voiding the

loan. *See* Opening Br. at 24. When the West Virginia legislature wants to authorize debt cancellation, it does not mince words. Instead, it states expressly that "the loan is void and the consumer is not obligated to pay either the principal or the loan finance charge," W. Va. Code § 46A-5-101(2), or "the court may cancel the debt." *Id.* § 46A-5-105. In contrast, § 46A-2-121 states only that the court may "refuse to enforce" an unconscionable agreement. Plaintiffs provide no explanation for this plainly different language, but the actual explanation is clear: an "unenforced" agreement cannot bestow benefits or impose obligations on *either* party. Here, that means Plaintiffs cannot both retain the loan proceeds *and* not repay any of the principal.

The case law confirms this textual interpretation of § 46A-2-121. Specifically, this Court has recognized that damages for "unconscionable conduct are limited to actual damages and, if the court so determines, a penalty of not less than one hundred nor more than one thousand dollars." *Bolen*, 188 W. Va. at 692, 425 S.E.2d at 834. Plaintiffs argue that this sentence describes only "'*additional* damages' to those *self-contained* in § 46A-2-121." Pl. Br. at 31-32. However, the additional damages discussed in *Bolen* were additional damages *within Article 5* of the WVCCPA, not those in § 46A-2-121: specifically, the damages in § 46A-5-101, which could be added to those in § 46A-2-102(5) regarding a buyer or lessee's right of action. *See Bolen*, 188 W. Va. at 691-92, 425 S.E.2d at 833-34 ("Thus, while W. Va. Code, 46A-2-102(5) [1974], allows the consumer to recover an amount not to 'exceed the amount owing to the assignee at the time of such assignment,' *its exception for an additional amount because of fraud is controlled by W. Va. Code, 46A-5-101* [1974]. As we have seen under this latter section, the additional damages for fraud or unconscionable conduct are limited to actual damages . . . .") (emphasis added). *Bolen*'s reference to § 46A-2-121 comes earlier, when the Court recognizes that § 46A-5-101 provides the remedy for a violation of § 46A-2-121. *See id.*, 188 W. Va. at 691, 425

S.E.2d at 833 ("W. Va. Code, 46A-5-101 [1974] . . . outlines the types of additional damages that may be recovered for various violations of Chapter 46A, and specifies 'illegal, fraudulent or unconscionable conduct (§ 46A-2-121)[.]'"). Thus, § 46A-2-121 does not provide any remedies in addition to—and in conflict with—§ 46A-5-101. Moreover, cancellation of the debt is punitive (*see infra* Part IV), and thus is expressly prohibited by *Bolen*. *See id.*, 188 W. Va. at 692, 425 S.E.2d at 834 ("Consequently, punitive damages are not available under the fraud or unconscionable conduct provisions of W. Va. Code, 46A-2-121 [1974], and W. Va. Code, 46A-2-102(5).").

Plaintiffs assert that "[t]his Court has approved of the use of this statutory power for many years in a variety of contexts," Pl. Br. at 32, but no precedent supports their assertion. Both of the cited cases simply remand without prescribing any particular remedy, and neither mentions any authority for cancellation. *See U.S. Life Credit Corp. v. Wilson*, 171 W. Va. 538, 542, 301 S.E.2d 169, 173 (1982); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 569, 567 S.E.2d 265, 285 (2002). Indeed, *U.S. Life Credit* expressly recognized that the remedy would be provided by § 46A-5-101, not by § 46A-2-121. *See* 171 W. Va. at 542, 301 S.E.2d at 173 (directing that the trial court "enter summary judgment for the appellant on his state law claim and determine the amount of the civil penalty provided for by law, W. Va. Code, 46A-5-101(1)").

Furthermore, Plaintiffs' interpretation of § 46A-2-121 cannot be reconciled with the other provisions of the WVCCPA. *See* QL Br. at 24-25; *Byrd v. Option One Mortgage Corporation*, No. 2:04-cv-01058 (S.D.W. Va., April 12, 2007), slip op. at 22-23. Plaintiffs criticize *Byrd*, arguing that Judge Copenhaver "overlook[ed] the fact that the unconscionability statute, § 46A-2-121, expressly gives the court the power to 'impair rights on debts' by refusing to enforce

'consumer loans' or any part thereof." Pl. Br. at 32. In reality, *Byrd* quoted the "refuse to enforce" language, *see* slip op. at 21, and unremarkably concluded that it "should be construed *in pari materia* with the remedial sections of Article 5 pertaining to unconscionable, fraudulent and illegal acts," not to authorize a remedy of cancellation, *see id.* at 22-23. Plaintiffs argue that § 46A-5-101(5) prohibits impairment of debts "[e]xcept as otherwise provided," and § 46A-2-121 supposedly otherwise provides. *See* Pl. Br. at 32. However, this argument simply assumes the conclusion that § 46A-2-121 provides for cancellation, and it does not. Moreover, it fails to explain why § 46A-5-105 expressly provides for cancellation *only* for unsecured debt, a provision that would be superfluous if cancellation based on unconscionability were allowed for *all* debt under § 46A-2-121. *See Byrd*, slip op. at 23.

Cancellation of the loan also cannot be based on a violation of the appraisal statute because there was no "willful" violation, as required under W. Va. Code § 31-17-17(a). *See* QL Br. at 25. Plaintiffs assert that "[w]illfulness has been established," Pl. Br. at 36, but there was no such finding by the Circuit Court. Indeed, the Circuit Court repeatedly stated that the appraisal violation was merely negligent. *See* Findings of Fact and Conclusions of Law entered Feb. 25, 2010 ("2/25/10 Op.") at 15, 17, 20 (A140, A142, A145). While Plaintiffs argue that the negligence finding was limited to the "manual appraisal review step," Pl. Br. at 35, the Circuit Court made clear that for "*the whole question of the appraisal* . . . [i]t was, basically, a finding of negligence . . . rather than a finding of willful, wanton disregard." Sept. 1, 2010, Hearing Transcript, Hon. Arthur Recht, pp. 117-118 (A2433) (emphasis added). Plaintiffs quote the court's discussion of whether the appraisal was "bona fide," where the court stated "there was no finding there, that that was done negligently." *Id.* at 118 (A2433). However, Plaintiffs omit the next paragraph, where the court actually discusses willfulness, and states: "[I]f you . . .want to

somehow suggest that that conduct may have been willful, wanton, deliberate to civil obligations all under Mayer versus Frobe, I will permit that because there was no finding, but the bulk of the findings relating to the appraisal, there have been findings, and that is, it was a done process, and conduct, reliance were all negligent." *Id.* Simply put, the court explained that while Plaintiffs could make the argument, "there was no finding" of willfulness and "there have been findings" of negligence. Absent a willfulness finding—indeed, the word willful is not used at all in the Circuit Court's actual opinion—there is no basis for "cancellation" under § 31-17-17(a).

Plaintiffs also try to defend the forfeiture based on W. Va. Code § 46A-6-106(a)'s allowance for "equitable relief," Pl. Br. at 33, but the principle of *in pari materia* applies equally here. *See Byrd*, slip op. at 22. In any event, Plaintiffs ignore the well-established principle that forfeiture is not an equitable remedy. *See* QL Br. at 26-27. They likewise ignore that forfeiture here would be plainly inequitable because the $144,800 in principal from Quicken Loans that Mrs. Jefferson no longer has to pay back is a windfall for her. *See* QL Br. at 27-28; *see also infra* Part IV.

Finally, in a single sentence, Plaintiffs make a token effort to defend the forfeiture as a remedy for fraud because "defenses of the WVCCPA are not available" for common-law fraud. Pl. Br. at 34 (quoting *Casillas v. Tuscarora Land Co.*, 186 W.Va. 391, 394, 412 S.E.2d 792, 795 (1991)). But the issue here does not concern a defense, but rather the remedy for fraud, which is defined by the WVCCPA. *See* W. Va. Code § 46A-5-105 ("If a creditor has willfully violated the provisions of this chapter applying to illegal, *fraudulent* or unconscionable conduct or any prohibited debt collection practice, . . . the court may cancel the debt when the debt is not secured by a security interest.") (emphasis added). Moreover, even if the WVCCPA were inapplicable, and the finding of fraud could be upheld (which it cannot), forfeiture of the

principal of a loan is not a permissible remedy for common-law fraud. Plaintiffs provide no argument, let alone precedent, to dispute the basic principle that one seeking to void a contract based on fraud must return any benefit received under the contract. *See* QL Br. at 27.

IV. THE PUNITIVE DAMAGES AWARD WAS UNSUPPORTED BY ANY VALID CLAIM AND WAS GROSSLY EXCESSIVE.

A. The Circuit Court erred in awarding punitive damages because only the unsupported fraud claim supported punitive damages.

Quicken Loans established in its opening brief that none of Plaintiffs' statutory claims permits an award of punitive damages, leaving only their fraud claim as a potential basis for such damages. QL Br. at 29. Plaintiffs do not contest this, and appear to expressly concede the point with respect to their WVCCPA claims. Pl. Br. 43 at n.19. And, as demonstrated earlier (*see supra* Part II), the Circuit Court's fraud finding cannot be sustained. Accordingly, the punitive damages award should be vacated in its entirety.

B. The Circuit Court failed to perform the required *Garnes* analysis.

As established in Quicken Loans' opening brief, where a circuit court does not make the required *Garnes* findings, its decision to award punitive damages is "reversible error." *State ex rel. Harper-Adams v. Murray*, 224 W. Va. 86, 93-94, 680 S.E.2d 101, 108-09 (2009). Here, the Circuit Court did not make the necessary findings, most conspicuously in its failure to address *Garnes*' "relationship to the harm" factor — including its failure to explain why Plaintiffs' attorney's fees and the already-punitive loan forfeiture were deemed "harm" to be multiplied in calculating punitive damages.

Plaintiffs make no claim that this cavalier treatment of the massive punitive damages award satisfied *Garnes*, instead arguing only that the failure to satisfy *Garnes* did not violate procedural due process or, alternatively, was "harmless." Pl. Br. at 36-37. These arguments cannot salvage the Circuit Court's punitive damages award, in light of this Court's holding in

Harper-Adams — which Plaintiffs fail even to cite — that a failure "to make the necessary findings required by *Garnes* constitutes reversible error." 224 W. Va. at 94, 680 S.E.2d at 109.

C. The Circuit Court's award of punitive damages was grossly excessive.

Quicken Loans' opening brief established that the punitive award was grossly excessive under both West Virginia law and the U.S. Constitution. The award was vastly out of proportion to the reprehensibility of the alleged conduct — an unauthorized promise by a single employee in violation of Quicken Loans' policy — and wholly disproportionate to the harm at issue. In particular, the Circuit Court improperly inflated the award by multiplying two forms of relief (both based on statutory claims that do not authorize punitive damages) that more properly should have *mitigated* the award: the loan forfeiture and the payment of Plaintiffs' attorney's fees. The ratio between the punitive award and the *actual* compensatory damages in this case was an unsustainable 120-to-1. *See* QL Br. at 33-34.

In response, Plaintiffs rely on purported "facts" that are wholly unsupported by the record, and seek to inflate the harm at issue through arguments that defy both law and logic.

1. Plaintiffs' attempt to depict Quicken Loans as "encourag[ing]" fraud is completely unsupported by the record.

Apparently recognizing that an employee's wrongful conduct that does not reflect corporate policy cannot support a large award of punitive damages, Plaintiffs assert, without record support, that "Quicken is characterized by a culture of fraud, trickery and deceit—encouraged by management and practiced on a grand scale." Pl. Br. at 37; *see also id.* at 38-39. The Circuit Court made no such finding, and Plaintiffs' only apparent support for this claim is a statement by Quicken Loans' counsel that "'there was nothing unusual about this loan.'" *Id.* at 39 (quoting A1059-1060). But that statement, of course, was made in support of counsel's contention that there was *no* fraud in connection with the loan – *i.e.*, that the alleged promise that

Ms. Jefferson could refinance was never made. Plaintiffs' attempt to portray it as an admission that *fraud* was routine is self-evident sophistry. Indeed, the only record testimony on point was that Quicken Loans trained its mortgage bankers *not* to make such promises. (A1076.) Plaintiffs cannot salvage the award by weaving a tale of widespread fraud out of whole cloth.

2. The Circuit Court improperly inflated the punitive award by treating cancellation of the loan and attorney's fees as compensatory.

The Circuit Court erred in multiple ways when it included the forfeiture of the loan balance and the attorney's fees award as measures of "harm" to Plaintiffs for purposes of calculating punitive damages. The only claim that can support punitive damages is the fraud claim, and therefore the only compensatory damages relevant to the punitive damages ratio are the damages for that claim. Both of the remedies at issue here, however, related to Plaintiffs' *statutory* claims, and those claims, as noted above, do not permit punitive damages. In any event, even aside from this problem, neither the loan forfeiture nor Plaintiff's attorney's fees can properly be considered "harm" for purposes of the compensatory-to-punitive ratio inquiry required by both West Virginia law and the U.S. Constitution.

a. Relief granted on claims that do not authorize punitive damages cannot be used to justify an inflated punitive award.

As Quicken Loans argued in its opening brief (at 36), any punitive damages must rest solely on Plaintiffs' fraud claim, yet both the award of attorney's fees and the loan forfeiture were based on Plaintiffs' statutory claims. The fee award was expressly made pursuant to W. Va. Code § 46A-5-104. *See* 2/17/11 Op. at 1-2 (A309-10). And Plaintiffs make only a perfunctory argument that the loan could be cancelled as a remedy for fraud. (*See* p. 13, *supra*.)

Plaintiffs nonetheless contend that the fees and loan cancellation were properly used as compensatory damages in the punitive-to-compensatory ratio, claiming that the denominator of that ratio need not relate to the claim on which punitive damages are awarded. Rather, they

contend, the court need only "compare the *total amount* of the compensatory award with the *total amount* of the punitive award. There is no requirement for a claim-by-claim analysis." Pl. Br. at 43 n.19 (emphasis in original).

The law is to the contrary. In *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997), this Court made clear that the required review to ensure that punitive damages "bear a reasonable relationship to compensatory damages," Syl. Pt. 3, 200 W. Va. at 594, 490 S.E.2d at 681 (internal quotation marks omitted), must be applied to the damages for each claim separately. In *Vandevender*, this Court considered the punitive-to-compensatory ratio with respect to the plaintiff's unlawful termination/failure to rehire claims separately from the ratio applicable to the plaintiff's retaliation claim. *Id.*, 200 W. Va. at 606-07, 490 S.E.2d at 693-94. Notably, this Court held that the ratio on the former claims was excessive, *focusing solely on the damages awarded for that claim.* *Id.*, 200 W. Va. at 606, 490 S.E.2d at 693. It did *not* simply "compare the total amount of the compensatory award with the total amount of the punitive award." Pl. Br. at 43 n.19 (emphasis omitted). Likewise, in *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010), this Court carefully distinguished between medical monitoring claims and property damage claims, and calculated the applicable ratio for the property damage claims by considering *only* the value of the relief awarded on those claims. 225 W. Va. at 557, 694 S.E.2d at 890.

Here, the only relief even arguably awarded on the fraud claim was the $17,476.72 in restitution, and that is therefore the only relief that can be considered in applying the requirement of "fundamental fairness" that punitive damages "bear a reasonable relationship to compensatory damages." *Vandevender*, Syl. Pt. 3, 200 W. Va. at 594, 490 S.E.2d at 681.

b. The amount of the loan forfeiture is not "compensatory damages" or "harm" that may be included in the relevant ratio.

As demonstrated in Quicken Loans' opening brief (at 34-36), the loan cancellation cannot rationally be included as a measure of "the harm . . . from the defendant's conduct," *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 461, 419 S.E.2d 870, 874 (1992), syl. pt. 13, in assessing the punitive damages award's "proportionality to the harm." *State Farm*, 538 U.S. at 427. Unlike such items as allegedly excessive fees or interest payments, there is no coherent theory on which a borrower's receipt of $144,800 in loan principal—which the Circuit Court later turned into a windfall that need not be repaid, even interest-free—can be deemed a measure of "harm" suffered by the borrower. The Circuit Court's decision to forgive the principal in its entirety cannot be anything but a naked penalty; it plainly did not compensate for any "concrete loss" suffered by Plaintiffs.[3] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

Plaintiffs make no claim that the principal forgiven *does* constitute harm. Instead, they offer an alternative justification that entirely ignores the loan *principal* forgiven by the Circuit Court, claiming instead that the proper measure of harm is the entire "amount of interest that was payable over the life of the loan," *i.e.*, $520,065.61. Pl. Br. at 40-41. As an initial matter, this theory has no basis in the Circuit Court's opinions, which never adopted any such expansive view of "harm." In any event, the notion that the entire finance charge for a mortgage loan can be considered a harm suffered by the borrower defies reason. The finance charge simply represents the cost of borrowing $144,800 for 30 years, and Plaintiffs made no claim that the

[3]Plaintiffs contend that the loan forfeiture totaled $227,000, including a purported $83,000 in "accrued interest, late charges, and other fees" as of June 2010 (a date after the court had already ordered cancellation of the entire loan). Pl. Br. at 40. Plaintiffs appear to have simply "reverse-engineered" their conclusion from the total punitive damages awarded by the Circuit Court. The Circuit Court made no such findings, let alone any findings on treating such illusory interest and charges as actual harm or relating them in any rational way to punitive damages.

interest rate on the loan—for a borrower with Ms. Jefferson's income and credit history—was unconscionably high. Interest payments at a market rate of interest represent the legitimate price of borrowing money, not a "harm" to the borrower.[4]

Plaintiffs' primary support for this expansive notion of "harm" is an Oregon intermediate appellate decision that, upon scrutiny, offers them no support at all. Plaintiffs contend that *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. App. 2007), holds that all interest payable over the life of the loan is the correct measure of potential damages, *see* Pl. Br. at 40-41, but *Vasquez-Lopez* held no such thing. *Vasquez-Lopez* expressly *declined* to address the correct measure of potential damages, and instead simply "accept[ed] plaintiffs' figure" on the ground that the defendant failed to properly raise any contrary argument. 152 P.3d at 958. The other case cited by Plaintiffs, *Mitchell v. Fortis Ins. Co.*, 686 S.E.2d 176 (S.C. 2009), is even less apposite, as it simply held that—where a health insurer fraudulently rescinded a policy to avoid paying benefits to an HIV sufferer—the harm was, quite logically, the present value of the payments the defendant fraudulently avoided. *Id.* at 187.

Moreover, the notion that Plaintiffs' potential harm was 30 years of interest payments flatly conflicts with their theory of the case: According to Plaintiffs, it was evident that Ms. Jefferson would *not* be able to make those payments and would inevitably suffer foreclosure. Notably, Plaintiffs do not contend—as the logic of this theory would suggest they should—that the potential harm was the loss of Ms. Jefferson's house. Presumably, this is because Ms. Jefferson *already* had little or no equity in the house: she owed $69,349.82 to CitiFinancial on her existing mortgage (A1276), and according to Plaintiffs' own evidence the house was worth

[4] Moreover, even if there *had* been a finding that the interest rate was excessive, the only legitimate harm would be the amount of the excess—or, more accurately, the present value of the excess payments over time—not the entire interest payment.

only $46,000 (*see* Pl. Br. at 13). Moreover, given that Ms. Jefferson defaulted on her Quicken Loans mortgage payments of $1,144 per month, she very likely would have defaulted on her pre-existing loans, which required monthly payments of $1,460. In short, the Quicken Loans mortgage was not the cause of Ms. Jefferson's default, and she had no equity in the house to lose. *See Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 73-75 (Cal. 2005) ("potential harm" under *TXO* is limited to harm that is likely to be *caused* by the defendant's conduct).

Finally, Plaintiffs contend that, alternatively, the "value of the voided loan" may be counted as harm "because it represents the amount of illegal, unconscionable, and fraudulent debt the Respondents were compelled to shoulder." Pl. Br. at 41-42. This is a non sequitur that confuses liability with harm. That aspects of a loan are held to be improper hardly means that the loan *principal* received by the borrower—here, cash from Quicken Loans that Plaintiffs used to retire existing debt and buy a new car—is harm to the borrower.

c. The amount of attorney's fees is not "compensatory damages" or "harm" that may be included in the relevant ratio.

Quicken Loans also demonstrated in its opening brief that the award of attorney's fees to Plaintiffs cannot properly be treated as compensatory damages under either the U.S. Constitution or West Virginia law. *State Farm v. Campbell* itself declined to treat attorney's fees as compensatory damages in the relevant ratio, and attorney's fees are not a measure of the "harm" caused by the defendant. To the contrary, because punitive damages and attorney's fees serve many of the same purposes—attorney's fees have a significant punitive component, and one purpose of punitive damages is to offset the plaintiff's litigation costs—an award of attorney's fees favors a *reduced* punitive award. QL Br. at 36-39. Plaintiffs have no convincing response to these points.

First, it bears reiteration that the attorney's fees award rests *solely* under the WVCCPA (*see* A309-10); hence, even if it could be considered "compensatory" in some sense under that Act, it still cannot support a punitive damages award, because punitive damages awards may not be based on violations of the Act. *Bolen*, 188 W.Va. at 692, 425 S.E.2d at 834.

Second, Plaintiffs dismiss the U.S. Supreme Court's exclusion of punitive damages from the ratio in *State Farm* by claiming that "the issue of attorney fees *was neither raised nor decided* by the Court." Pl. Br. at 45 (emphasis in original). But the issue of attorney's fees *was* raised in *State Farm*: the plaintiffs in that case expressly argued that the Court should include attorney's fees in the denominator of the ratio, *see* Brief of Respondents at 17 n.5, 2002 WL 31387421, yet the Court excluded them and stated that the $1 million compensatory damages award "was complete compensation," 538 U.S. at 426. In addition, as argued in Quicken Loans' opening brief (at 37), *State Farm* analogized the relevant ratio to statutory double and treble damages penalties, *id.* at 425, which rarely, if ever, include attorney's fees in the amount to be doubled or trebled. Plaintiffs fail to address this point.

Third, Plaintiffs fail to rebut Quicken Loans' showing that punitive damages and attorney's fees serve many of the same purposes, such that an award of attorney's fees *reduces* rather than increases the appropriate size of a punitive award. *See, e.g., DeCurtis v. Upward Bound Int'l, Inc.*, No. 09 Civ. 5378(RJS), 2011 WL 4549412, at *6 (S.D.N.Y. Sept. 27, 2011) (fact that "Plaintiff did not suffer physical violence, and she is being awarded compensatory damages and attorney's fees" favored lower punitive award); *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (award of fees "favor[s] a lesser rather than greater award"). Indeed, *State Farm* itself cautioned against allowing punitive awards that duplicate other forms of relief. 538 U.S. at 425.

Plaintiffs' denial of the overlap between the purposes of attorney's fees and punitive damages is squarely contrary to this Court's cases. As an initial matter, Plaintiffs deny that the discretionary nature of attorney's fees under the WVCCPA imports punitive considerations into such fee awards, *see* Pl. Br. at 48 n.24, but this Court has specifically found the exercise of discretion under the WVCCPA to turn, at least in part, on whether the defendant's actions constitute "egregious conduct." *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 305, 512 S.E.2d 217, 227 (1998); *see also Boyd v. Goffoli*, 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004) ("An obvious purpose of awarding attorney fees and costs in a case involving fraud is that intentional conduct such as fraud should be punished and discouraged.").

In addition, Plaintiffs fail to address the fact that one of the recognized purposes of punitive damages is to cover plaintiffs' litigation costs—a purpose that disappears when, as here, the Plaintiffs have *already* been awarded their fees. As this Court explained in *Muzelak v. King Chevrolet, Inc.*, 179 W.Va. 340, 368 S.E.2d 710 (1988), "punitive damages are designed in part to subsidize litigation costs," and "are often awarded to off-set litigation expenses." *Id.*, 179 W.Va. at 347, 368 S.E.2d at 717; *see also Harper-Adams*, 224 W. Va. at 94, 680 S.E.2d at 109 (same). Likewise, *Garnes* focuses on punitive damages' purpose of ensuring payment of plaintiffs' litigation costs, directing that the amount of such costs is relevant to the appropriate size of a punitive award because "[w]e want to encourage plaintiffs to bring wrongdoers to trial." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991). Again, where attorney's fees have *already* been awarded to the plaintiff, this purpose of punitive damages disappears and a *lower* punitive award is appropriate, not an increased one—let alone one increased, as in this case, by *trebling* the already-reimbursed attorney's fees.

Fourth, Plaintiffs' contention that attorney's fees are a proper measure of harm is inconsistent with the practices of the numerous states that have adopted statutory ratios limiting the amount of punitive damages. Those state statutes consistently define the denominator of the ratio—*i.e.*, the "harm" part of the equation—by reference to compensatory damages or actual damages, and do *not* include attorney's fees as part of that figure. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 615-619 (1996) (Ginsburg, J., dissenting) (listing multiple state statutory caps); Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 Suffolk Univ. L. Rev. 855, 882-895 (2010) (similar).

Fifth, Plaintiffs' position—that a plaintiff's attorney's fees are a relevant "harm" for ratio purposes when there is a fee award, but not when there is no fee award, *see* Pl. Br. at 43-48—produces the anomaly that the very same attorney's fees can be deemed "harm" or "not harm," depending solely on an unrelated after-the-fact determination of whether the court will order them reimbursed. In addition, it produces the further anomaly that a plaintiff who has been more fully compensated (by receiving damages and attorney's fees) will receive substantially *greater* punitive damages than one who has been less fully compensated. *See State Farm*, 538 U.S. at 426 (*lower* punitive award appropriate where there already has been "complete compensation").

Sixth, Plaintiffs' cases treating attorney's fees as part of a punitive damages ratio are inapposite. Their primary case, *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005), turns on a specific feature of Pennsylvania law that treated attorney's fees as part of the compensatory damages for insurance bad faith claims. *Id.* at 236-37. The same is true of *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 Fed. App'x 424 (3d Cir. 2007) (an unpublished opinion that merely applied *Willow Inn* to the same bad faith statute), and *Action*

Marine, Inc. v. Continental Carbon Inc., 481 F.3d 1302, 1321 (11th Cir. 2007) (relying on a similar feature of Georgia law). As one court recently explained, cases like these are irrelevant outside of their unique settings. *Chasan v. Farmers Group, Inc.*, No. 1 CA-CV 07-0323, 2009 WL 3335341, at *11 n.4 (Ariz. App. Sept. 24, 2009) (specifically addressing *Willow Inn* and *In re Diviney*, 225 B.R. 762, 777 (B.A.P. 10th Cir. 1998)). Yet another of Plaintiffs' cases, *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), did *not* include attorney's fees in its calculation of the ratio, *see id.* at 640, and appears to have considered litigation costs in the same way they are considered under *Garnes*. *Id.* at 642.[5]

Finally, Plaintiffs fail to address the fact that if attorney's fees and the loan forgiveness are to be counted as compensatory, the compensatory damages in this case total over $700,000, placing this case squarely within *State Farm*'s instruction that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. Damages exceeding $700,000 are plainly "substantial," particularly for a loan of less than $150,000 and a home valued by Plaintiffs' evidence at $46,000.

V. THE CIRCUIT COURT ERRED BY FAILING TO OFFSET COMPENSATORY DAMAGES AWARDED AGAINST QUICKEN LOANS WITH THE SUMS PREVIOUSLY PAID TO PLAINTIFFS BY SETTLING CO-DEFENDANTS

Quicken Loans is entitled as a matter of law to an offset of compensatory damages and the loan cancellation based on the settlement of Plaintiffs' claims against Appraisals Unlimited,

[5] The other case on which Plaintiffs primarily rely, *Blount v. Stroud*, 915 N.E.2d 925 (Ill. App. 2009), is simply in error. In particular, it mischaracterizes every one of the out-of-state cases it cites (*id.* at 943-44) as holding that attorney's fees should generally be included in the ratio denominator: neither *Willow Inn* nor *Continental Trend Resources* supports that proposition, for the reasons stated above; *Walker v. Farmers Insurance Exchange*, 63 Cal. Rptr. 3d 507, 512 n.8 (Cal. App. 2007), *notes* what the ratio would be with attorney's fees included, but in fact *excludes* those fees from the ratio on which it bases its holding, *see id.* at 514 (reducing punitive damages to $1.5 million, based on 1:1 ratio with $1.5 million compensatory damages award); and *Girdner v. Rose*, 213 S.W.3d 438, 449 (Tex. App. 2006), declined to decide whether attorney's fees should be included.

Inc., and Dewey Guida. *See* QL Br. at 39-40. Plaintiffs' only response on the merits is the conclusory statement that "Quicken could not meet the elements of 'joint obligation' and/or 'single indivisible injury' under *Zando*, 182 W.Va. 597,390 S.E.2d 796 (1990)." Pl. Br. at 48-49. However, Plaintiffs fail to identify any injury other than the single injury allegedly caused by the existence of the Loan, which necessarily incorporates the damage from the allegedly inflated appraisal by Guida. Indeed, Plaintiffs repeatedly point to the appraisal as the source of the damages here. *See* Pl. Br. at 21-25. Thus, Defendants are entitled to setoff because "[a] plaintiff may not recover damages twice for the same injury." *Pennington v. Bluefield Orthopedics, P.C.*, 187 W.Va. 344, 349, 419 S.E.2d 8, 13 (1992) (internal quotation marks omitted); *see also id.*, 187 W.Va. at 350, 419 S.E.2d at 14 ("[W]e find that the plaintiff, Lisa Pennington, did suffer a single indivisible loss as the result of the actions of multiple parties. Her loss — a fractured clavicle and the ensuing complications — resulted from the actions of two successive and independent tortfeasors . . . .").

Furthermore, the offset issue was properly preserved for review because it was clearly raised in Quicken's Post-Trial Motion for Offset of Judgment filed on April 8, 2011. Plaintiffs argue that Defendants waived the offset argument by failing to raise it within 10 days of the judgment under W.Va. Rule of Civil Procedure 59(e). *See* Pl. Br. at 48. However, they cite no precedent for this argument, and this Court has made clear that the time bar of Rule 59(e) does not apply to an offset claim. *See Savage v. Booth*, 196 W.Va. 65, 468 S.E.2d 318 (1996). In *Savage*, the defendant filed a post-trial motion for offset almost three months after the judgment was entered, and the trial court held that the motion was untimely under Rule 59. *See id.*, 196 W.Va. at 67, 468 S.E.2d at 320. This Court reversed, holding "as a matter of law that upon the defendant's motion the trial court was required to deduct the settlement amount from the jury

verdict prior to entering the final judgment." *Id.*, 196 W.Va. at 70, 468 S.E.2d at 323. The time bar of Rule 59(e) was inapplicable because "[t]he trial court's initial failure to give such credit [for offset] was a mere oversight and does not arise to the level of more substantial errors which must be considered pursuant to Rule 59(e) or Rule 60(b)." *Id.* Instead, "the trial court should have corrected the error pursuant to Rule 60(a)," *id.*, which has no time bar. Likewise, here, the trial court was required to correct the error and grant the offset, and the 10-day requirement of Rule 59(e) is inapplicable. Its refusal to do so[6] was reversible error.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed as to liability for fraud and unconscionability, the award of damages should be vacated to eliminate punitive damages and cancellation of the Loan, and damages should be offset by the judgment as to former defendants.

[6] Respondents suggest that the Circuit Court "did not reach" the motion for offset. Pl. Br. at 48. To the contrary, the Court's May 2, 2011, clearly denies "all" post-trial motions filed by defendants. (A 343.)

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CERTIFICATE OF SERVICE

I, Johnny M. Knisely II, counsel for Petitioner Quicken Loans Inc., certify that on this 10th day of November, 2011, I served the foregoing "Petitioner Quicken Loans Inc.'s Motion to Exceed Rule 38(c)'s Default Page Limit for the Reply Brief of Petitioner Quicken Loans Inc." and "Reply Brief of Petitioner Quicken Loans Inc." by sending true and correct copies thereof via United States Mail, addressed as follows:

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No. 11-0910
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

OCT 2 1 2011

QUICKEN LOANS, INC.,
Defendant below,
Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,
Plaintiffs below,
Respondents

(From the Circuit Court of Ohio County, No. 08-C-36)

BRIEF OF AMICUS CURIAE,
JAY D. HIXSON, AND MARTIN P. SHEEHAN,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JOHN BASSETT,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JOHN COTRILL,
TRUSTEE OF THE BANKRUPTCY ESTATE OF CHARLES GROAH,
TRUSTEE OF THE BANKRUPTCY ESTATE OF MARK HEDRICK,
TRUSTEE OF THE BANKRUPTCY ESTATE OF DOROTHY and NORMAN KIDD,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JOSHUA LIVELY,
TRUSTEE OF THE BANKRUPTCY ESTATE OF MELVIN MARQUESS,
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TRUSTEE OF THE BANKRUPTCY ESTATE OF HELEN WEEKLEY
IN SUPPORT OF APPELLANT(S) LOURIE BROWN and MONIQUE BROWN

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Concise Statement Regarding Amicus

Jay Dee Hixson is a debtor in a pending Chapter 13 bankruptcy case now pending in the United States Bankruptcy Court for the Northern District of West Virginia at Case No.5: 09-bk-00814. He is the plaintiff in an adversary proceeding in the same court at A.P. No. 5:09-ap-00042. The adversary proceeding alleged various causes of action under the West Virginia Residential Mortgage Lender Broker and Servicer Act, W.Va. Code §31-17-1, et seq. To the extent this appeal might impact Mr Hixson's claims under this Act, he has a specific interest in this appeal. Mr Hixson is represented in the Bankruptcy Court by Martin P. Sheehan.

Martin P. Sheehan is a member of the panel of Chapter 7 Trustees maintained by the United States Trustee for Region 4. See, 28 U.S.C. § 586(a)(1). He is the trustee administering several different bankruptcy estates in which he has identified potential causes of action under West Virginia Residential Mortgage Lender Broker and Servicer Act, W.Va. Code §31-17-1, et seq. In this capacity, the capacity in which he files this brief, he has a specific interest in this appeal. Martin P. Sheehan is an attorney, authorized to represent himself as trustee for the various bankruptcy estates.

Statement Concerning Authorship

This brief was written solely by Mr. Sheehan. It was funded by him, and his law firm. He has no expectation for reimbursement, except as may be authorized by the United States Bankruptcy Court for the Northern District of West Virginia from one or more of the matters pending there.

Argument

A. There is a statute that permits cancellation of a loan secured by real estate.

The brief of Appellant filed in the instant appeal repeatedly claims there is no West Virginia statute that authorizes the relief granted by Judge Recht to Lourie and Monique Brown; specifically the cancellation of the Note, and Deed of Trust securing payment of the Note at issue in this case. That claim is inaccurate.

West Virginia Code § 31-17-17. Subparagraph (a) provides:

> (a) If any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan may be canceled by a court of competent jurisdiction.

There can be little doubt that a mortgage loan is a secured loan. West Virginia Code § 31-17-1(m) defies a primary mortgage loan as follows:

> m) "Primary mortgage loan" means any loan primarily for personal, family or household use **that is secured by a mortgage, deed of trust or other equivalent consensual security interest** on a dwelling as defined in Section 103(v) of the Truth in Lending Act or residential real estate upon which is constructed or intended to be constructed a dwelling.

(Emphasis added.) A secondary loan is similarly defined. <u>See</u> West Virginia Code § 31-17-1(o):

> (o) "Subordinate mortgage loan" means any loan primarily for personal, family or household use **that is secured by a mortgage, deed of trust or other equivalent consensual security interest** on a dwelling as defined in Section 103(v) of the Truth in Lending Act or residential real estate upon which is constructed or intended to be constructed a dwelling and is subject to the lien of one or more prior recorded mortgages or deeds of trust.

Thus, as a matter of law, there is a statute which authorizes cancelling a loan secured by real estate. This statute was addressed by Judge Recht (App. 00126). The loan can be <u>cancelled</u> upon a showing of a <u>willful</u> violation.

B. Cancel does not mean rescind.

In an elaborately constructed brief, the appellant argues that "canceled" does not mean

"canceled," but instead means "rescinded." The import of this word is that something, which was in effect, is no longer in effect. "Void" is a synonym.

"Rescind" has a distinct meaning. The import of this word is that something which was has been undone and the parties are returned to the status quo ante.

Appellant insists that cancel mean rescind. It does so to claim that when a mortgage loan is cancelled the right to recover the principal, although not interest or fees, remains. This does violence to the use of the word "cancel" elsewhere in the West Virginia Code. For example, Appellant appears to concede that a regulated consumer loan, an unsecured debt, can be cancelled for illegal, fraudulent or unconscionable conduct pursuant to W.Va Code § 46A-5-105 for a willful violation of the West Virginia Consumer Protection Act. Brief for Appellant at 22. The nature of the conduct that justifies cancellation under that statute does not imply half-hearted relief.

Restoring the parties to the status quo ante, as appellant appears to suggest, would logically require elimination of the consumer payment obligation. Appellant claims however a cancelled loan would still permit the recovery of the principal. Will lenders seek a judgment in their favor for the principal of a cancelled unsecured loan? Will the legal rate of interest apply to such a judgment? What then was cancelled? Posing such questions establishes the absurd position being advocated. "Cancel" is clearly not the equivalent of rescind in the unsecured loan context.

Why, then, would cancel mean rescind in the secured loan context? There is no good reason. It is true that cancellation is a serious remedy. But the statute addresses a serious problem.

One would have to been living under a rock not to have noticed that the wide ranging scale of inappropriate lending practices have impacted the national economy. This is not a situation where lax enforcement of measures designed to insure fair lending should be encouraged. If bad loans are cancelled, the citizens of West Virginia shall have their property freed from the claims of charlatans masquerading as honest businessmen, and be able to reclaim their equity[1] for productive purposes.

C. Cancellation of the Deed of Trust

The West Virginia Residential Mortgage Lender Broker and Servicer Act, W.Va. Code § 31-17-17(a), quoted above, does describe cancellation of a loan, without making a specific reference to a Deed of Trust. One might question whether a Deed of Trust can be cancelled, if the loan is cancelled. Complex statutory analysis is not necessary.

The Deed of Trust at issue provides as follows:

> This Security Instrument secures Lender: (i) the repayment of the Loan, and all renewals, extensions, and modifications of the Note; and (ii) the performance of the Borrower's covenants under this Security Instrument and the Note.

(Deed of Trust starts at Appendix at 001482). If the loan is cancelled, the Deed of Trust, by its own terms secures a non-existent obligation. It needed to be declared void to remove a cloud on

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[1] Appellant argues that inadequate collateral value works to the disadvantage of a lender who cannot recover from foreclosing on the collateral all that is owed. But borrowers are disadvantaged too. They lose their assets.

They lose the benefit of a real "fresh start" in bankruptcy. While debtors can, and do, have the right to exempt property in a bankruptcy proceeding (11 U.S.C. § 522 and W.Va. Code § 38-10-4), the exemption only protects the equity. See generally, Matter of Roberts, 40 B.R. 629 (Bankr. W.D. Mo., 1984).

When unscrupulous lenders lend in excess of fair market value, and lend to cause borrowers to lose their homes, in violation of the expressed public policy of West Virginia, W.Va. Code § 31-17-8(m)(3) and (8), debtors are cheated of the opportunity to use bankruptcy proceedings to recover.

the title. TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457 419 S.E.2d 870 (1992). Judge Recht knew that and acted appropriately.

D. Wilfulness

The remedy for violations of the West Virginia Residential Mortgage Broker, Lender and Servicer Act are contained in W.Va. Code § 31-17-17. Subparagraph (a) provides:

> (a) If any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan may be canceled by a court of competent jurisdiction.

Appellees claimed that the mortgage loan made to them was made in wilful violation of the terms of this statute.

What is a willful violation? Willful was described in 94 C.J.S., *Willful* as having a certain fluidity. It was described as meaning the person "knows what he is doing, and intends what he is doing." The term is said to imply a conscious act. It has been said a "willful" act is one done "knowingly, permissively, voluntarily, deliberately, persistently, perversely, obstinately or stubbornly." Willful acts are acts that are not done accidently, carelessly, thoughtlessly, heedlessly or inadvertently. Willful acts are within the control of the person acting. Doing an act willfully does not imply the act was done with a corrupt motive or an evil intent.

Workers' Compensation Law has provided significant insight into the statutory meaning of willfulness in West Virginia. In a number of cases, there has been a challenge to workers being compensated for "willful misconduct" or "willful disobedience to an employer's rule." For example, in Barta v. State Compensation Commissioner, 128 W.Va. 448, 37 S.E.2d 81 (1946) the Court held that an employee was on notice of the contents of a statute if the statute had been delivered to him. Thereafter, intentional acts, in violation of the statute, would constitute "willful

misconduct." This was the rule used to deny compensation in Carbon Fuel Co v. State Comp. Comm'r, 112 W.Va. 203, 164 S.E. 27 (1932) (riding a mine car designed to transport coal only in violation of statute).

In Young v. State Compensation Commissioner, 123 W.Va. 299,14 S.E.2d 774 (1941) the Court held an experienced miner had actual knowledge and observed "while wilful misconduct growing out of a disobedience to law or rules must rest on knowledge thereof, men cannot close their eyes to their surroundings and say that they do not have knowledge of things which are, figuratively speaking, in plain view." Id. at __, 14 S.E.2d at 776. In Carrico v. State Compensation Commissioner, 127 W.Va.463, 127 S.E.2d 463 (1945) the Court denied compensation to an employee who failed to where goggles and subsequently suffered an eye injury. There the Court held that knowing the employee knew there was a rule for his benefit, and that the employee acknowledged he chose not to comply. Such was held to be willful misconduct.

Additional insight into the meaning of the word "willful" can be found in the West Virginia Consumer Protection Act, W.Va. Code § 46A-1-101, *et seq.* That statute is designed to protect consumers and foster sound and fair business practices. White v. Wyeth, W.Va. (No. 35296 2010) and McVoy v. Amerigas, Inc., 170 W.Va. 526, 295 S.E.2d 16 (1982) and State ex rel. McGraw v. Scott-Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). The West Virginia Residential Mortgage Broker, Lender and Servicer Act, 31-1-1, *et seq.,* should be recognized as having a similar purpose. It too provides specific kinds of consumer protections and fosters sound business practices. It is designed to work in harmony with the West Virginia Consumer Protection Act. See, W.Va. Code § 31-17-18(b).

The West Virginia Consumer Protection Act, authorizes certain penalties, between $100 and $1,0000, to be imposed for "violations" of the statute. See W.Va. Code § 46A-5-101(a). Attorney's fees and inflationary adjustments are warranted for mere violations. See, W.Va. Code § 46A-5-104, and § 46A-5-106. Where a violation is "willful" the underlying debt may be cancelled. W.Va. Code § 46A-5-105. This compares favorable with the relief sought by plaintiff here under W.Va. Code § 31-17-17.

Under the West Virginia Consumer Protection Act, the Attorney General has the right to bring suit where violations are "repeated and willful." W.Va. Code § 46A-7-111(2). The defense of inadvertence in W.Va. Code §31-17-17(d) is similar to the inadvertence defense in W.Va. Code § 46A-7-111(1). Both of these require the business entity to have come forward promptly to notify a consumer of the inadvertent non-compliance, and to remedy the non-compliance. Failure to so act, eliminates this defense.

The distinction between inadvertence and willfulness may not seem substantial. But the difference between a course of fair dealing and overreaching exploitive behavior can sometimes be one of degree. It is for this reason, that the defense of inadvertence, under both statutes, requires a pro-active component. The violation of clear rules by a licensee must be discouraged if fair dealing is to become the standard of the market. In such a light, conscious choice to disregard statutory commands must be considered willful.

The statute here does not require that proof of willfulness involve a desire to bring about a specific consequence.[2] This is so because the statute requires proof of a "willful violation" of

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[2] In Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), the United States Supreme Court considered what was a "willful injury" under 11 U.S.C. § 523(a)(6). There the Court held that the act causing the injury must have been a conscious one, and that the

the provisions of the relevant statute and not some "willful" consequence.[3]

Conclusion

These *amici* ask that the West Virginia Residential Mortgage Lender Broker and Servicer Act be fairly read and used to affirm the rulings of Judge Recht in substantial degree.

RESPECTFULLY SUBMITTED

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resulting injury must have been intended. The distinction is not dependent on a different construction of "willful" than the plaintiff advocates, herein, but is, instead, dependent on the difference in the word modified by willful.

[3] Much of this same discussion of willfulness permeates the decision of the United States Court of Appeals for the Fourth Circuit in Smith v. Jordan (In re: Jordan), 521 F.3d 430 (4th Cir. 2008)(2-1)(Bailey, C.J., Dist. Ct. N.D. W.Va.). There the Court concludes that a discharge could be denied for "refusal to obey a Court order" only by a showing of willfulness. Willfulness would be established by proof of knowledge of the existence of the Court order, and a conscious choice to disobey it. Proof of a conscious choice was found lacking because of a lack of precision in the order.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2011, I caused this Brief of Amicus Curiae to be served on the following persons by mailing a true and correct copy via United States Postage Mail.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,

Plaintiffs below,

Respondents.

Proposed Amici Brief of National Association of Consumer Advocates, Mountain State Justice, West Virginia Attorney General, and West Virginia Association for Justice in Support of Plaintiffs and Respondents Lourie Brown and Monique Brown

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I. INTRODUCTION AND STATEMENT OF INTEREST[1]

The issues raised in this appeal, *inter alia*, whether the Court has the authority under West Virginia Code § 46A-2-121 to void unconscionable loans, whether punitive damages are available when a mortgage lender acts reprehensibly, and whether West Virginia consumers can continue to rely on the protections afforded by West Virginia Consumer Credit and Protection Act, have enormous implications for consumers in West Virginia. The mortgage crisis has caused millions of people to lose their homes, the stock market to plummet, millions if not billions of dollars in 401K losses, and the costly bailout of the institutions responsible for the crisis in the first place.

The actions of Quicken Loans, Inc. (Quicken) in this case typify the type of reckless lending that led to the mortgage crisis. With the help of a willing appraiser, Quicken extended Lourie Brown and Monique Brown a predatory loan that vastly exceeded the value of their property and would have ultimately resulted in the loss of their property when a hidden balloon payment came due. As set forth in Section III.A. below, predatory loans like the Browns' have been on the rise for several reasons, including the creation of a secondary market for loans where lenders pass off the risk of default to investors, and ultimately main street. One overarching characteristic of most predatory loans is lender manipulation of the appraisal process. In particular, as the trial court found in this case, lenders send appraisers target numbers in the form of an estimated value prior to the appraiser completing his or her assignment. The appraiser then takes this number and reverse-engineers an appraisal report so that the loan will close, often

[1] Counsel for Plaintiffs did not author or make monetary contributions specifically intended to fund the preparation or submission of this brief.

leaving the borrower with an upside down mortgage. As explained in Section III.B., federal regulators, Congress, and the appraisal industry universally condemn lender manipulation of the appraisal process due to the harm caused to borrowers and the economy in general. Notwithstanding the existence of federal regulations and industry standards prohibiting the practice, appraisal manipulation persists for a number of reasons, including lack of enforcement and the non-existence of available remedies. As a result, the best and most important consumer protection continues to be through the enforcement of state law and remedies, as set forth Sections III.C. and III.D.

The Amici submitting this brief, Mountain State Justice, Inc. (MSJ), West Virginia Association of Justice (WVAJ), the National Association of Consumer Advocates (NACA), and West Virginia Attorney General's Office[2] all have an interest in seeing West Virginia law enforced and predatory lenders like Quicken held accountable for their actions. Accordingly, the Amici ask that the trial court's opinion be upheld.

MSJ is a non-profit legal service firm. The firm represents low income individuals in a variety of contexts. A large portion of the firm's representation involves predatory lending, loan servicer abuse, and foreclosure defense. MSJ has a significant interest in ensuring that persons injured by such acts have a means to remedy such abuses.

WVAJ is a non-profit legal organization consisting of attorneys licensed to practice law in the State of West Virginia who represent citizens of the State of West Virginia injured and/or harmed by the wrongful conduct of others. A large area of interest to the organization's

[2] The West Virginia Attorney General is tasked with enforcing the West Virginia Consumer Credit Protection Act in accordance with W.Va. Code § 46A-7-102.

members involves predatory lending, loan servicer abuse, and foreclosure defense. WVAJ members have a significant interest in ensuring that persons injured by such acts have a means to remedy such abuses.

NACA is a non-profit legal organization consisting of private and public sector attorneys who represent consumers victimized by fraudulent, abusive and predatory business practices. Predatory lending, loan servicer abuse, and foreclosure defense are of particular interest to the organization's members. NACA members have a significant interest in ensuring that persons injured by such acts have a means to remedy such abuses.

II. OPERATIVE FACTS IN THE UNDERLYING CASE

Amici incorporate by reference the statement of facts provided in the Respondents' brief.

III. DISCUSSION AND ARGUMENT

A. The rise of predatory mortgage lending

Predatory mortgage lending is a real, pervasive, and destructive problem in our society. Indeed, the explosion in predatory lending over the past ten years has contributed to the greatest foreclosure crisis since the Great Depression. The statistics are grim. Millions of homes have already been foreclosed upon and estimates are that another eight to ten million mortgages, roughly one in five outstanding home loans, will default in the next six years.[3] While homeowners, academics, and policymakers debate the various causes of the crisis, almost all agree that predatory mortgage lenders played a key role in the crisis by stripping billions of dollars of equity from American homeowners. Predatory lenders profit by selling complex

[3] *See* Testimony of Laurie S. Goodman, Amherst Securities Group to the Subcomm. on Housing, Transportation and Community Development of the S. Comm. on Banking, Housing and Urban Affairs at 2 (Sept. 20, 2011) (http://varbuzz.com/wp-content/uploads/2011/09/20110920_Goodman.pdf).

mortgage products through aggressive sales tactics, coercion and even fraud. The story in this case is an all too common one: A lender preys on an unsuspecting homeowner, making false promises that it never intends to keep. It conceals important information about the terms of the loan, and ultimately makes a lot of money as a result of its unscrupulous behavior.

While predatory lending has eluded a single, uniform definition, a joint report by the U.S. Department of Housing and Urban Development and the U.S. Department of the Treasury defines predatory lending as "engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of understanding about loan terms...that, alone or in combination, are abusive or make the borrower more vulnerable to abusive practice."[4]

The explosion in predatory lending has been driven by two interrelated factors. The first factor driving the growth in predatory lending is the rise of non-traditional, nondepository market participants – i.e., mortgage brokers, mortgage bankers, and finance companies.[5] Unlike

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[4] HUD-Treasury Task Force on Predatory Lending, Curbing Predatory Home Mortgage Lending at 1 (2000) ("HUD-Treasury Report") (http://www.huduser.org/Publications/pdf/treasrpt.pdf); *see also* Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2039, 2043-44 (2007) (cataloguing predatory lending practices and including rent seeking, fraud and deception, discrimination, and concealment); Michelle W. Lewis, *Perspectives on Predatory Lending: The Philadelphia Experience*, 12 J. Affordable Housing & Community Dev. L. 491, 493 (2003) (http://www.philatask.com/ABAart03.pdf) (describing subprime lending as "subprime mortgage loans and high-interest loans for people with bad credit that are accompanied by egregiously unethical practices, such as hidden exorbitant fees and taxes, grossly inflated sales prices for property, flipping, and making loans to customers who have no realistic ability to repay").

[5] *See* U.S. Gen. Accounting Office. Rep. No. GAO-04-0280, *Consumer Protection: Federal and State Agencies Face Challenges in Combatting Predatory Lending*, Report to the U.S. Senate Chairman and Ranking Minority Member, Special Committee on Aging at 22 (2004) ("GAO Report") (http://www.gao.gov/new.items/d04280.pdf) (noting that "[f]ifty-nine percent of subprime lenders are independent mortgage companies (mortgage bankers and finance companies)"); Kathleen C. Engel &

traditional lenders, these market participants are largely unregulated, and typically do not hold their loans within their own portfolios. Instead, they pass off the risk of default when they sell a mortgage note to assignees in the secondary market.[6] Quicken Loans is one such finance company.

Many of these non-traditional, nondepository institutions focus their lending in the subprime market, which caters to people who, because of poor credit history or even discrimination by traditional lenders, have been historically excluded from obtaining credit.[7] Indeed, the emergence of predatory lending is inextricably linked to the growth in subprime lending. Subprime loans charge higher interest rates, points and fees compared to loans in the prime or conventional mortgage market. Certainly, not all subprime loans are predatory loans. However, lenders making predatory loans operate within and exploit advantages in the subprime market, which is generally less regulated and less competitive than the conventional lending market.[8]

The second factor driving the growth of predatory lending is "securitization." Securitization is the process of investing in and providing capital for mortgage lending. The process begins with the origination of a loan. The lender groups loans into pools (or the lender may sell the loan to an entity that then groups loans into pools). Securities backed by this group

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Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1273 (2002).

[6] GAO Report, *supra* note 3, at 20.

[7] HUD-Treasury Report, *supra* note 2, at 17-18.

[8] *Three Markets*, *supra* note 3, at 1270-97 (describing market dynamics and regulatory deficiencies that allow predatory lenders to thrive within the subprime mortgage market).

of mortgages are then sold to investors. The investors receive a portion of the future income stream generated from the borrowers' payments. In some cases, future payments to investors were guaranteed by Fannie Mae, Freddie Mac, or Ginner Mae. In other cases, future payments were guaranteed by bond insurance companies. The lender receives proceeds from the sale of the group of loans that it can then use to make more loans. Importantly, the risk of loss is passed from the lender to the investors (or the insurers). Using the securitization process, predatory lenders are able to churn bad loans, selling them to investors and passing off the risk of the inevitable default while obtaining proceeds from the sale with which to make new predatory loans.[9] Like many other subprime lenders, Quicken Loans sells its loans through the securitization process, thereby holding little, if any, risk of default.

B. Influencing appraisals is unconscionable and universally condemned.

Mortgage-loan officers and mortgage lenders make money when they close loans. They can only close mortgage loans when the loans are supported, at least on paper, by the value of the underlying collateral. Consequently, unscrupulous lenders who make predatory loans described above are tempted to influence the appraisal process and encourage appraisers to inflate the market-value of homes they are hired to appraise. As the trial court recognized, the practice of a lender influencing the appraisal process and passing estimated values to appraisers before an appraisal has been performed serves "no legitimate purpose." It is also universally condemned by federal law and well-established industry standards. Unfortunately, federal regulation and the

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[9] Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2213-14 (2007); *see also* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 13 (2011).

industry standards have largely fallen short in reigning in these abusive practices. This leaves state law as the best, and in many instances, only avenue to regulate lender practices.

1. Federal law and regulators forbid lenders from influencing appraisals.

A host of federal agencies with lending oversight – including Office of the Comptroller of the Currency (OCC), Federal Reserve Board (FRB), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) -- have adopted strict requirements designed to ensure independent and accurate appraisals.[10]

These requirements were promulgated in response to the lending industry's repeated failure to regulate itself. For instance, in response to the savings and loan crisis of the 1980s, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1331 *et seq.*, was enacted on August 9, 1989. In pertinent part, Title XI of the FIRREA provided that all written real estate appraisals for federally related transactions conform with the Uniform Standards of Professional Appraisal Practice (USPAP), as promulgated by the Appraisal Standards Board of the Appraisal Foundation. *See* 12 U.S.C. § 1339 (1989); *see also* 12 U.S.C. § 3350 (1989).[11] As set forth below, USPAP forbids appraisers from accepting assignments based upon the reporting of a predetermined value - i.e. a lender provided estimated value or loan amount.

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[10] *See* OCC: 12 C.F.R. §§ 34.45, .45 (1994); FRB: 12 C.F.R. §§ 225.64, .65 (1994); FDIC: 12 C.F.R. §§ 323.4, .5 (1994); OTS: 12 C.F.R. §§ 564.4, .5 (1994); and NCUA: 12 C.F.R. §§ 722.4, .5 (1994).

[11] "The term 'written appraisal' means a written statement used in connection with a federally related transaction that is *independently and impartially prepared* by a licensed or certified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by presentation and analysis of relevant market information." 12 U.S.C.A. § 3350 (emphasis added).

Throughout the 1990s and through the mid-2000s, federal regulators continued to emphasize the need for independent appraisals. In October 1994, federal regulators jointly issued *Interagency Appraisal and Evaluation Guidelines,*[12] which provided:

> Because the appraisal and evaluation process is an integral component of the credit underwriting process, it should be isolated from influence by the institution's loan production process. An appraiser and an individual providing evaluation services should be independent of the loan and collection functions of the institution and have no interest, financial or otherwise, in the property or the transaction.

See OCC: Comptroller's Handbook for Commercial Real Estate and Construction Lending (1998) (Appendix E) at 79.

These 1994 *Guidelines* were followed up in October 2003 with an *Independent Appraisal and Evaluation Functions, Interagency Statement,*[13] and in March 2005 with *Frequently Asked Question on Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions.*[14] In pertinent part, the October 2003 *Interagency Statement* again emphasized the need for independent appraisals, free from influence from lending institutions. *See* OCC: AL 2003-9 at 1-2.

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[12] *See* OCC: Comptroller's Handbook for Commercial Real Estate and Construction Lending (1998) (Appendix E) (http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/realcon.pdf); FRB: SR letter 94-55, FDIC: FIL-74-94, and OTS: Thrift Bulletin 55a (same) (NCUA was not a part of these Guidelines at the time).

[13] *See* OCC: AL 2003-9 (http://www.occ.gov/static/news-issuances/memos-advisory-letters/2003/advisory-letter-2003-9a.pdf); FRB: SR letter 03-18, FDIC: FIL-84-2003, OTS: CEO Memorandum 184, and NCUA: LTCU 03-CU-17 (same).

[14] *See* OCC: OCC 2005-6 (http://www.occ.gov/news-issuances/bulletins/2005/bulletin-2005-6a.pdf); FRB: SR letter 05-05, FDIC: FIL-20-2005, OTS: CEO Memorandum 213, and NCUA: LTCU 05-CU-06 (same).

The FAQ was even more specific with respect to information that could legitimately be passed to an appraiser as part of an appraisal assignment. The FAQ provided:

> *What information should the regulated institution provide to the appraiser upon engagement?*
>
> Answer: The regulated institution should provide the property's address, its description, and any other relevant information. The regulated institution may also provide a copy of the sales contract for purchase transactions. **However, the information provided by the regulated institution should not unduly influence the appraiser or in any way suggest the property's value.** The regulated institution and the appraiser should agree on the scope of the appraisal in advance, consistent with the Uniform Standards of Professional Appraisal Practice (USPAP) and the agencies' appraisal regulations and interagency guidelines.

See OCC: OCC 2005-6 at 2 (FAQ, No. 4) (emphasis added). Finally, in December 2010, these agencies issued revised *Interagency Appraisal and Evaluation Guidelines.*[15] These guidelines reaffirmed their position on appraiser independence, and provided, *inter alia*:

> An institution's policies and procedures should ensure that it avoids inappropriate actions that would compromise the independence of the collateral valuation function, including:
>
> - Communicating a predetermined, expected, or qualifying estimate of value, or a loan amount or target loan-to-value ratio to an appraiser or person performing an evaluation.
>
> - Specifying a minimum value requirement for the property that is needed to approve the loan or as a condition of ordering the valuation.

75 Fed. Reg. at 77457.

Notwithstanding the efforts of these federal agencies, many unscrupulous lending institutions continued, or even increased the number of predatory loans they were originating through the early 2000s. In fact, appraiser influence became one of most prevalent characteristics

[15] *See* 75 Fed. Reg. 77450 (2010).

of these loans. These practices ultimately culminated in the financial meltdown of the housing industry, and ushered in a new wave of federal legislation, including the Dodd-Frank Act.

In pertinent part, the Dodd-Frank Act amended the Truth in Lending Act, 15 U.S.C. § 1631 *et seq.*, by adding Section 129E (Appraisal independence requirements), which provides, *inter alia*, that it is unlawful to "engage in any act or practice that violates appraisal independence," including "seeking to influence an appraiser or otherwise to encourage a targeted value in order to facilitate the making or pricing of the transaction[.]" *See* 15 U.S.C.A. § 1639e (2010).

Other more recent promulgations of federal law reaffirm the universal condemnation of influencing appraisals. *See e.g.*, 12 U.S.C.A. § 1715z-23 (2009) (prohibiting lending institutions from influencing appraisers); and 12 U.S.C.A. § 3353 (2010) (providing that "appraisals are conducted independently and free from inappropriate influence and coercion"). It remains to be seen whether this new federal legislation will be effective in preventing lender influence of appraisers.

2. *The Appraisal Foundation and USPAP condemn influencing appraisals.*

The Uniform Standards of Professional Appraisal Practice (USPAP), as promulgated by the Appraisal Standards Board of the Appraisal Foundation, are the generally accepted standards for professional appraisal practice in the United States. Indeed, all real estate appraisals for federally related transactions must conform with these standards. *See* 12 U.S.C. § 1339; *see also* 12 C.F.R. § 34.44; 12 C.F.R. § 225.64; 12 C.F.R. § 323.4; 12 C.F.R. § 564.4; and 12 C.F.R. § 722.4. Under the USPAP, an appraiser's "impartiality, objectivity, and independence" is of

paramount importance. *See* USPAP *Conduct* Ethics Rule (2004;[16] 2010[17] (same)). Indeed, "an appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions[.]" *See id.* Moreover, it is unethical for an appraiser to accept an assignment that is contingent on the reporting of a predetermined result (e.g., opinion of value), the amount of a value opinion, or the attainment of a stipulated result. *See* USPAP *Management* Ethics Rule (2004;[18] 2010[19] (same)).

3. *Fannie Mae condemns influencing appraisals.*

In October 15, 2010, Fannie Mae issued Appraiser Independence Requirements to be incorporated into its Selling Guide, also condemning the influencing of appraisals. In pertinent part, Fannie Mae's Appraiser Independence Requirements provide that lending institutions should not "[p]rovid[e] to an appraiser an anticipated, estimated, encouraged, or desired value for a subject property or a proposed or target amount to be loaned to the Borrower[.]" *See* Fannie Mae Appraiser Independence Requirements at 1-2.[20]

4. *State law condemns influencing appraisals.*

Unfortunately, most of the aforementioned federal regulations and industry standards have fallen short in curbing the practice of predatory lending, many due to lack of enforcement

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[16]http://www.ourappraisal.com/xsites/appraisers/centralilappraisal/Content/UploadedFiles/USPAP%202004.pdf

[17]http://uspap.org

[18]http://www.ourappraisal.com/xsites/appraisers/centralilappraisal/Content/UploadedFiles/USPAP%202004.pdf

[19] http://uspap.org

[20] https://www.efanniemae.com/sf/guides/ssg/relatedsellinginfo/appcode/pdf/air.pdf

or a private right of action. It is also unclear whether new federal legislation will have an effect on curbing the practice of predatory lending.

Thus, the best and most effective way of regulating the industry remains at the state level. Indeed, most states, including West Virginia, have passed specific prohibitions on appraiser influence.[21] Although the specifics of West Virginia law in this regard will be addressed in the following section of this brief as well as in other submissions by Amici, suffice it to say, West Virginia state law prohibits lenders from improperly influencing appraisers. Nevertheless, such regulation is meaningless absent the ability to enforce strong remedies as described below.

C. The Court should uphold the power of a Circuit Court to void unconscionable loans under 46A-2-121.

Petitioner Quicken argues that the Circuit Court lacked the authority to void the loan obligation. Quicken's position is contrary to the plain language of the statute and long-standing precedent interpreting the WVCCPA. Section 46A-2-121 of the West Virginia Code clearly states: "[I]f the court as a matter of law finds: (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, *the*

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[21] *See e.g.*, Alaska Stat. § 06.60.340; Ariz. Rev. Stat. Ann. § 32-3633; Ark. Code Ann. § 23-39-513; Cal. Civ. Code § 1090.5; Cal. Fin. Code § 50204; Cal. Fin. Code § 22755; Cal. Bus. & Prof. Code § 11345.4; Colo. Rev. State. § 21-61-910.2; Conn. Gen. Stat. § 36a-760j; 5 Del. Code § 2418; D.C. Code § 26-1114; Fla. Stat. § 494.00255; Idaho Code § 26-31-211; 205 ILCS 635/2-4; 205 ILCS 635/7-13; Ind. Code § 23-2-5-9.1; Ind. Code § 23-2-5-20; Ind. Code § 24-5-23.5-7; Iowa Code § 543D.18A; Iowa Code § 535D.17; Kan. Stat. Ann. § 58-2344; Ky. Rev. Stat. Ann. § 286.2-030; La. Rev. Stat. 6:1092; Me. Rev. Stat. Ann. tit. 9-A, § 8-206-J; Mich. Comp. Laws § 493.77; Mich. Comp. Laws § 445.1679; Minn. Stat. § 58.13; Miss. Code Ann. § 81-18-27; Mo. Rev. Stat. § 443.737; Neb. Rev. Stat. § 45-714; Nev. Rev. Stat. § 645C.557; Nev. Rev. Stat. § 645C.730; N.H. Rev. Stat. Ann. § 397-A:14; N.Y. Banking Law § 590-b; N.C. Gen. Stat. § 53-244.111; N.D. Cent. Code § 13-10-17; Ohio Rev. Code § 1322.07; Ohio Rev. Code § 1321.59; Okla. Stat. tit. 59, § 2095.18; 10 Pa. Cons. Stat. § 46.2; R.I. Gen. Laws § 19-14.10-17; S.C. Code Ann. § 37-22-190; S.D. Codified Laws § 36-21B; S.D. Codified Laws § 36-21A-71; Tenn. Code. Ann. § 45-13-401; Tex. Fin. Code Ann. § 180.153; Utah Code Ann. § 61-2c-301; Wash. Rev. Code § 19.146.0201; and Wis. Stat. § 224.77.

court may refuse to enforce the agreement[.]" W. Va. Code § 46A-2-121(1) (emphasis added). It is a bedrock principle of statutory interpretation that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." *See Thomas v. Morris*, 224 W. Va. 661, 666, 687 S.E.2d 760, 765 (2009) (quoting Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548*, 144 W. Va. 137, 107 S.E.2d 353 (1959)).

Enforcement of the statute's clear and unambiguous terms is also supported by the purpose of the WVCCPA, which is to extend broad protections to West Virginia consumers beyond the common law's allowance for voidance of unconscionable contracts. *See Casillas v. Tuscarora Land Co.*, 186 W. Va. 391, 393-94, 412 S.E.2d 792, 794-95 (1991); *see also Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, ___, 711 S.E.2d 577, 583 (2011); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995) ("The purpose of the CCPA is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action. . . . Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.").

Furthermore, the Act similarly allows the Attorney General to bring an injunctive relief action to enjoin the enforcement of unconscionable contracts, while also leaving all remedies open to consumers to enforce directly. *See* W. Va. Code § 46A-7-109. The provisions of the Act should be read "in *pari materia* to ensure that legislative intent is being effected." *Community Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, ___, 712 S.E.2d

504, 513-14 (2011). Thus, reading the Act as a whole, both consumers and the Attorney General have the right to seek an injunction against the enforcement of an unconscionable contract.

Finally, this Court has repeatedly held in no uncertain terms that contracts and/or contractual provisions can be declared void and unenforceable due to their unconscionability, and circuit courts have uniformly followed in this course both before and after *Byrd v. Option one Mortgage Corp.*, No. 2:04-1058, slip op. (S.D. W. Va. Apr. 12, 2007). *See*, Syl. Pt. 5, *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 231, 511 S.E.2d 854, 856 (1998) (holding that, under West Virginia Code section 46A-2-121, certain agreements are "unconscionable and, therefore, void and unenforceable as a matter of law"); *see also, e.g.*, Syl. Pt. 20, *Brown v. Genesis Healthcare Corp.*, ___ W. Va. ___, ___S.E.2d ___, 2011 WL 2611327 (2011) ("A contract term is unenforceable if it is both procedurally and substantively unconscionable.*")*; *Herrod v. 1st Rep. Mortg. Corp., Inc.*, 218 W. Va. 611, 624, 25 S.E.2d 373, 386 (2005) ("[T]he West Virginia Consumer Credit and Protection Act provides that a loan or any portion thereof may be voided if a court concludes that the loan was induced by unconscionable conduct or the loan contains unconscionable terms[.]") (Starcher, J., concurring); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 568, 567 S.E.2d 265, 284 (2002) (declaring an unconscionable contract void and unenforceable); *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va., Inc.*, 186 W. Va. 613, 618, 413 S.E.2d 670, 675 (1991) (holding an unconscionable contract provision "void for unconscionability"); *Bailey v. Greentree*, No. 04-C-23-N (Roane Co. W. Va. Jan. 26, 2009) (attached as Ex. 1); *Shelton v. CitiMortgage, Inc.*, No. 08-C-1190-K (Raleigh Co. W. Va. Aug. 24, 2009) (attached as Ex. 2); *Osburn v. Option One Mtg. Corp.*, No. 02-C-1164 (Kan. Co.

W. Va. May 19, 2005) (attached as Ex. 3); *Harper v. Conseco Fin. Serv. Corp.*, No. 01-C-1341 (Kan. Co. W. Va. May 12, 2002) (attached as Ex. 4).

It is equally clear that the circuit court has broad remedial powers to cure an unconscionable contract. *See Lang v. Derr*, 212 W. Va. 257, 260, 569 S.E.2d 778, 781 (2002) ("'If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, *or may so limit the application of any unconscionable term as to avoid any unconscionable result.*") (quoting Restatement (Second) of Contracts § 208 (1981)) (emphasis added). As a remedial statute, the WVCCPA was intended to extend the common law remedies available to consumers, not limit them. *See Casillas*, 186 W. Va. at 393-94, 412 S.E.2d at 794-95. As a result, as cited above, this Court has held that unconscionable terms are unenforceable both at common law and under the WVCCPA. In sum, Petitioner's cramped reading of the statutory provision would contravene the express language of the statute, the West Virginia Legislature's intent, and this Court's uniform interpretation of the provision.

The Amici and their members represent hundreds of West Virginia homeowners facing loss of their homes to predatory lenders. If Quicken's argument were accepted by this Court, it would dramatically limit these families' ability to avoid unconscionable and fraudulent loans that would otherwise certainly end in unjust foreclosures, despite their clear illegality. Consider the case of Carolyn Osburn. Ms. Osburn has a similar story to that of Respondent Brown. Osburn is a single mother living in Mercer County, West Virginia. She was induced by a fraudulently inflated appraisal into a predatory loan that contained an illegal balloon provision. As a consequence, Ms. Osburn faced a massive balloon payment due after fifteen years of payments

on her home loan. Because the loan was well over the value of her property, when the balloon payment came due, the amount owed on the loan would have exceeded the fair market value of Ms. Osburn's property. Ms. Osburn, who lives on a fixed income, would have had no way to pay this large lump sum. Nor could she expect to obtain a refinance when the indebtedness far exceeded the value of her property.[22] *See Osburn*, No. 02-C-1164, slip op. ¶ 9.

Were Quicken's position accepted, the trial court would have been powerless to void the loan (or even the balloon feature when it came due) and foreclosure would have been inevitable. Ms. Osburn's case – and Respondents' case – are just two examples of thousands of West Virginians who have been victimized by predatory lending conduct over the last decade. Without voidance as a remedy, these victimized West Virginians would not be able to seek relief from the foreclosures that result from predatory lenders' illegal activities.[23] Such a result would clearly contravene the purposes of the WVCCPA and this Court's interpretations of the Act, as well as common law. This Court has stated repeatedly that unconscionable and fraudulent loans should be declared void and unenforceable. The trial court's decision below to void the loan is consistent with the long-standing principles followed by this Court. *See, e.g.*, Syl. Pt. 5, *Arnold*, 204 W. Va. at 231, 511 S.E.2d at 856 ("[T]he agreement is unconscionable and, therefore, void

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[22] Likewise, should the Court read a rescission and tender requirement into the statute as Quicken suggests, it would essentially eliminate borrowers' remedies. In both Ms. Osburn's and the Browns' case (and in the cases of countless other victims of predatory lending), the loans exceeded the value of the property, making it impossible for the consumers to tender the loan proceeds.

[23] The Respondent Quicken has a history of engaging in the predatory conduct at issue in this case. Mountain State Justice, Inc. has represented other borrowers that have been induced into predatory loans with an inflated appraisal. *See Bishop v. Quicken Loans Inc.*, 2:09-CV-01076 (S.D.W. Va.); *Edmond v. Quicken Loans, Inc.*, No. 5:10-AP-05016 (Bankr. S.D.W. Va.); *Settle v. Quicken Loans, Inc.*, No. 10-C-1100-H (Kan. Co. W. Va.).

and unenforceable as a matter of law."). The ruling of the trial court below should therefore be affirmed.

D. The Circuit Court correctly included the compensatory award of attorney fees in determining that the punitive damages award was not excessive.

Consistent with the applicable state and federal precedent, the Circuit Court reviewed the award of punitive damages. As part of that review, the Circuit Court compared the punitive damage award of approximately $2.1 million to the compensatory damages found by the Court. In doing so, the Court included as part of the compensatory damages its award of $596,199.89 in attorney fees and litigation costs. On appeal, Quicken argues that it was improper to include attorney fees and costs in the determination of whether the punitive damages were excessive. Quicken's argument is that because an attorney fee award cannot be considered compensatory, it is inappropriate to use it to compare the compensatory award to punitive award. Quicken's argument is contrary to the majority rule. Moreover, it ignores the substantial body of cases from this Court finding such awards are compensatory and explicitly directing the Circuit Courts to include litigation expenses in their review of punitive damage awards.

1. This Court has explicitly authorized the inclusion of litigation costs as part of the review of a punitive damage award.

With respect to the review of a punitive damage award, this Court has set forth the following test:

> "Under our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court by applying the model specified in Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Thereafter, and upon petition, this Court will review the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*."

Syl. Pt. 5, *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996). With respect to the issue of the inclusion of attorney fees and costs, syllabus point 4 of *Garnes* is directly on point. Indeed, in *Garnes* the Court directed: "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors: (1) *The costs of the litigation*. . . ." Syl. Pt. 4, *Garnes v. Fleming, supra* (emphasis added). This holding has been repeatedly reaffirmed in the punitive damage decisions of this Court. *See, e.g., Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009); *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004); *Radec, Inc. v. Mountaineer Coal Development Co.*, 210 W.Va. 1, 552 S.E.2d 377 (2000); *Alkire v. First Nat. Bank of Parsons, supra*. Thus, the Circuit Court's inclusion of the award of attorney fees and costs in its review of the punitive damage award was not error as it amounts to the consideration of "the costs of litigation", a factor specifically mandated under *Garnes* and its progeny.

2. *Awards of attorney fees and costs under the West Virginia Consumer Credit and Protection Act are Compensatory Awards.*

The central premise of Quicken's argument is that it is improper to include an award of attorney fees and costs as part of the consideration of the excessiveness of a punitive award because the award of attorney fees and costs is itself punitive. Quicken is simply wrong. Quicken argues that attorney fees and costs are punitive in nature. With respect to statutory awards like the one entered here, this Court has consistently rejected such a view.[24]

[24]Quicken also argues that, because the award was based on the WVCCPA which does not provide for punitive damages, it is improper to include attorney fees in the review of the punitive award for excessiveness. Quicken cites no case for the proposition that a review for excessiveness is limited to the damages awarded under the cause of action supporting the punitive award. The question whether punitive damages are available under the WVCCPA is a

It is clear that attorney fee awards like the one here are made for compensatory purposes. The attorney fee award in this case was rendered pursuant to WVCCPA's fee shifting statute, W.Va. Code § 46A-5-104. This Court has emphasized that this provision is one of several fees shifting statutes enacted for "for the benefit and protection of the public." *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 n.15, 567 S.E.2d 265, 283 n.15 (2002). With respect to other similar provisions, it is clear that this Court considers statutory fee shifting as compensatory:

> Working people should not have to resort to lawsuits to collect wages they have earned. When, however, resort to such action is necessary, *the Legislature has said that they are entitled to be made whole by the payment* of wages, *liquidated damages, and costs, including attorney fees*. If the laborer were required to pay attorney fees out of an award intended to compensate him for services performed, the policy of these statutes would be frustrated.

Farley v. Zapata Coal Corp., 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981) (emphasis added); *see also Heldreth v. Rahimian.* 219 W.Va. 462, 471, 637 S.E.2d 359, 368 (2006) ("The purpose of fee-shifting statutes, such as that involved here [W.Va. Code § 5-11-13(c)] is to *benefit the employee. . . .*" (citations and internal quotations omitted; emphasis added)); *Daily Gazette Co., Inc. v. West Virginia Development Office*, 206 W.Va. 51, 58, 521 S.E.2d 543, 550 (1999) (This fee shifting statute [W. Va. Code § 29B-1-7], which is a marked departure from the general rule that each party bears his/her own litigation costs, *is intended to relieve some of the burden* associated with the public's pursuit of the right to access public records and to encourage

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wholly different one from what compensatory damages a reviewing court should use to determine if a punitive award is excessive. Indeed, in reviewing a punitive damage award a reviewing court is not limited to the damages incurred – let alone the damages awarded. The reviewing Court is explicitly is permitted to look at other factors such as the potential harm caused by the defendant's conduct. *See* Syl. pt. 1, in part, *Garnes v. Fleming Landfill, Inc., supra* ("[p]unitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions."). Finally, as noted above, *infra* Part D(1), costs of litigation are explicitly permitted as part of the review criteria.

the cooperation of public officials when requests for such records are made."(footnote omitted emphasis added)); *Orndorff v. West Virginia Dept. of Health*, 165 W.Va. 1, 4-5, 267 S.E.2d 430, 432 (1980) ("One obvious purpose of a provision for reasonable attorney fees [in a civil service reinstatement case] is *to provide a measure of restitution* to a civil service employee who has been wrongfully discharged or suspended and, as a result, forced to hire an attorney to seek redress. Equally apparent is another goal, to provide an inducement to the employee who has been wrongfully discharged to challenge the action since, *if successful, he is relieved of the burden of paying reasonable attorney fees*." (emphasis added)); syl. pt. 1, *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990) ("The purpose of W.Va.Code, 48-2-13(a)(4) (1986), [now 48-2-13(a)(6)(A) (1993)] is to enable a spouse who does not have financial resources to obtain reimbursement for costs and attorney's fees [incurred] during the course of the litigation.").

3. *Including awards of attorney fees and costs as part of the comparison of a punitive award with the compensatory awards is consistent with the majority rule.*

Finally, it is clear that the trial court's inclusion of attorney fees is consistent with the majority rule. In *Blount v. Stroud*, 395 Ill.App.3d 8, 27, 915 N.E.2d 925, 943-945, 333 Ill.Dec. 854, 872 - 874 (Ill.App. 1 Dist. 2009), the Court held: "We further note that the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the [excessiveness] analysis." The Court based this conclusion on established Illinois cases recognizing "that the amount of attorney fees expended in a case may be taken into account

when assessing the propriety of a punitive damage award. A wealthy defendant can mount an extremely aggressive defense, and the prospect of costly litigation can deter lawyers from representing plaintiffs in such cases." *Id.* (citations omitted). Other Courts agree. *See, e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 236-37 (3d Cir.2005); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642 (10th Cir.1996); *Walker v. Farmers Insurance Exchange*, 153 Cal.App.4th 965, 973 n. 8, 63 Cal.Rptr 507, n. 8 (2007); *Girdner v. Rose*, 213 S.W.3d 438, 449 (Tex.App.2006). As the Tenth Circuit has recognized, nothing in federal case law prohibits consideration of the costs incurred by the plaintiff in bringing the legal proceedings to vindicate rights as part of the "actual harm" suffered. *Continental Trend Resources*, 101 F.3d at 642.

These decisions are consistent with this Court's punitive damage jurisprudence. In *Garnes*, this Court explained that including litigation costs in the analysis is important because: "We want to encourage plaintiffs to bring wrongdoers to trial." *Garnes*, 186 W.Va. at 668, 413 S.E.2d at 909. Similar reasoning supports other Courts' agreement that the inclusion of attorney fees and costs is an appropriate punitive damage consideration. *Willow Inn, Inc.*, 399 F.3d at 236 ("Section 8371's attorney fees and costs provisions vindicate the statute's policy by enabling plaintiffs such as Willow Inn to bring § 8371 actions alleging bad faith delays to secure counsel on a contingency fee."); *Blount v. Stroud, supra* ("The purpose of section 1988 is to ensure effective access to the judicial process for persons with civil rights claims and to encourage litigation to enforce the provisions of the Civil Rights Act and the Constitution."); *Continental Trend Resources, Inc.*, 101 F.3d at 642 ("A rich defendant may act oppressively and force or prolong litigation simply because it can afford to do so and a plaintiff may not be able to bear the

costs and the delay. We have held that the costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award.").

IV. CONCLUSION

For these reasons, the Amici signing this brief respectfully request that the Court affirm the judgment of the trial court.

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No.11-0910

QUICKEN LOANS, INC.,
Petitioner

v.

LOURIE AND MONIQUE BROWN,
Respondents

Appeal from the Circuit Court of Ohio County
Honorable Arthur M. Recht, Judge
Civil Action No. 08-C-36

AFFIRMED, IN PART; REVERSED, IN PART;
AND REMANDED WITH DIRECTIONS

Submitted: September 19, 2012
Filed: November 21, 2012

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Justice McHugh delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. pt. 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996)

2. "‘"‘The essential elements in an action for fraud are: ‘(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.’ *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927)." Syl. Pt. 1, *Lengyel v. Ling*, 167 W.Va. 272, 280 S.E.2d 66 (1981).’ Syllabus Point 5, *Kidd v. Mull*, 215 W.Va. 151, 595 S.E.2d 308 (2004)." Syl. Pt. 5, *Folio v. City of Clarksburg*, 221 W.Va. 397, 655 S.E.2d 143 (2007).

3. "‘"The legislature in enacting the West Virginia Consumer Credit and Protection Act, W.Va. Code 46A-1-101, *et seq*., in 1974, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act. To further this purpose the legislature, by the express language of W.Va. Code, 46A-5-101(1), created a

cause of action for consumers and imposed civil liability on creditors who include unconscionable terms that violate W.Va. Code, 46A-2-121 in consumer agreements." Syl. pt. 2, *U.S. Life Credit Corp. v. Wilson*, 171 W.Va. 538, 301 S.E.2d 169 (1982).' Syl. pt. 1, *Orlando v. Finance One of West Virginia, Inc.*, 179 W.Va. 447, 369 S.E.2d 882 (1988)." Syl. Pt. 3, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), *overruled, in part, on other grounds, Dan Ryan Builders, Inc. v. Nelson*, __ W.Va. __, __ S.E.2d __ (No. 12-0502) (Nov. 15, 2012).

4. "'A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the "existence of unfair terms in the contract.' Syl. pt. 4, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.,* 186 W.Va. 613, 413 S.E.2d 670 (1991)." Syl. Pt. 4, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), *overruled, in part, on other grounds, Dan Ryan Builders, Inc. v. Nelson*, __ W.Va. __, __ S.E.2d __ (No. 12-0502) (Nov. 15, 2012).

5. "'Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.' Syllabus Point 3, *Smith v. State Workmen's Comp. Comm'r.*, 159 W.Va. 108, 219 S.E.2d 361

(1975)." Syl. Pt. 4, *Community Antenna Serv. Corp. v. Charter Communications, VI, LLC*, 227 W.Va. 595, 712 S.E.2d 504 (2011).

6. "'A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder*, 64 W.Va.659, 63 S.E. 385 (1908)." Syl. Pt. 5, *Community Antenna Serv. Corp. v. Charter Communications, VI, LLC*, 227 W.Va. 595, 712 S.E.2d 504 (2011).

7. "'Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.' Syllabus Point 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975)." Syl. Pt. 6, *Community Antenna Serv. Corp. v. Charter Communications, VI, LLC*,

227 W.Va. 595, 712 S.E.2d 504 (2011).

8. "'Equity will not enforce a forfeiture.' Syllabus, in part, *Craig v. Hukill,* 37 W.Va. 520, 16 S.E.363 (1892)." Syl. Pt. 1, *Helton v. Reed*, 219 W.Va. 557, 638 S.E.2d 160 (2006).

9. "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant."

Syl. Pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

10. "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury."

Syl. Pt. 4, *Garnes v. Fleming Landfill, Inc*., 186 W.Va. 656, 413 S.E.2d 897 (1991).

11. Attorneys fees and costs awarded under West Virginia Code §46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act shall be included in the compensatory to punitive damages ratio in cases where punitive damages are available.

12. "Rule 60(a) of the West Virginia Rules of Civil Procedure applied to clerical errors made through oversight or omission which are part of the record and is not intended to adversely affect the rights of the parties or alter the substance of the order, judgment or record beyond what was intended." Syl. Pt. 3, *Savage v. Booth*, 196 W.Va. 65, 468 S.E.2d 318 (1996).

13. "Where there is a single indivisible loss arising from the actions of multiple parties who have contributed to the loss, the fact that different theories of liability have been

asserted against them does not...prevent them from obtaining a verdict credit for settlements made with the plaintiff by one or more of those jointly responsible." Syl. Pt. 8, in part, *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

14. "Defendants in a civil action against whom awards of compensatory and punitive damages are rendered are entitled to a reduction of the compensatory damage award, but not the punitive damage award, by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties." Syl. Pt. 1, *Burgess v. Porterfield,* 196 W.Va. 178, 469 S.E.2d 114 (1996).

McHugh, J.:

Quicken Loans, Inc. (“Quicken”), a Michigan corporation and a large national mortgage lender doing business in West Virginia, appeals the May 2, 2011, order of the Circuit Court of Ohio County, West Virginia, denying post-trial motions for amendment of the circuit court’s findings of fact and/or conclusions of law and for offset following a verdict which found it liable for common law fraud and various claims under the West Virginia Consumer Credit and Protection Act, as set forth in Chapter 46A of the West Virginia Code, in connection with a subprime loan made to Plaintiff Lourie Brown.

Upon careful review of the briefs and arguments of the parties,[1] the record appendix and the applicable legal authority, and for the reasons set forth below, the order of the circuit court is affirmed, in part; reversed, in part; and this matter is remanded for further proceedings.

I. Factual and Procedural Background

[1]We acknowledge with gratitude the amici briefs of Jay D. Hixson and Martin P. Sheehan, as bankruptcy trustees; and National Association of Consumer Advocates; Mountain State Justice; West Virginia Attorney General; and West Virginia Association for Justice.

Plaintiff and her mother purchased the subject property, a duplex, in 1988, where they or a member of their family have resided ever since.[2] The subject property is located in East Wheeling, West Virginia, and was purchased for $35,000.00.[3]

Upon the death of her mother in 2002, Plaintiff became solely responsible for paying all of the property's utilities, maintenance, taxes and insurance premiums thereon. When these financial obligations, among others, became difficult to meet, Plaintiff refinanced the subject property in August 2003, for $40,518; in January 2004, for $63,961; and in May 2005, for $67,348. She also took out four separate loans for $1,500, $3,060, $5,000 and $7,650, respectively, with interest rates ranging from 24.99% to 31.00%.[4]

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[2]Plaintiff's mother died in 2002. When the events herein transpired, Plaintiff was forty-one years old and a single mother to three children. She no longer lives on the subject property but has since married and moved with her youngest child to Pittsburgh. Plaintiff testified that she returns to the subject property most weekends to check on her oldest child, Monique Brown, who resides there, and who, as a result of a 2001 automobile accident from which she suffered a traumatic brain injury, has short term memory loss and other permanent injuries.

[3]In 1993, Monique paid off the subject property with settlement monies she received from a wrongful death lawsuit following the death of her father and the subject property was transferred to her. According to the parties, at some point during the loan process in the present case, Monique executed a power of attorney appointing Plaintiff with the authority to pledge the subject property and use the loan proceeds in her discretion. The parties represent that Monique is a named party herein only because she is owner of the subject property.

[4]The refinancing and loans as above-described were with CitiFinancial. Additionally, in November 2003, Plaintiff borrowed $5,785 from AmeriFirst Loan, and in February 2006, Plaintiff took out a Refund Anticipation Loan ("RAL") with Jackson Hewitt (continued...)

In May of 2006, in an effort to consolidate her debt and lower her monthly payments, Plaintiff completed a basic on-line loan application after receiving a "pop-up" advertisement on her computer.[5] Thereafter, she began receiving telephone calls from various lending companies, including Quicken. Of the companies who contacted her, Plaintiff selected Quicken because she felt most comfortable dealing with mortgage banker Heidi Johnson, who "seemed very willing to help."[6]

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[4](...continued)
for $3,418, with an interest rate of 94.862%.

[5]As explained by Plaintiff, she "saw an ad for loans, and, like it would list an amount, like if you wanted $100,000, it might be $500 and some dollars a month, or $140,000 might be 6- to $700 a month. I thought, well, if I could consolidate everything and have a cheaper payment, that would be better for me. So that's what got me interested in that in the first place."

[6]Ms. Johnson's "willingness to help" is apparently derived from Quicken's written training materials. For example, Quicken provided "Selling Tips" to its employees to use when speaking with prospective borrowers on the telephone:

> Your credit came back and I've had a chance to review it. Unfortunately, because of your credit score and the trend of how your bills have been paid you don't qualify for conventional mortgage programs. However, the good news is that we specialize in situations like yours and we have a program that can offer you financial relief and can help get you back on track. What we'll do now is review your current credit situation, discuss the program for, its benefits, and then accept your $500 good faith deposit to get the loan into process.
>
> The bottom line is this program is perfect for you and really is Step 1 in our 2 step process toward getting you back on track. Actually most people refer to this as a Stepping Stone Loan. Once you have established a consistent track record of timely

(continued...)

On or about May 23, 2006, Quicken requested that Title Source, Inc. ("TSI") arrange for an appraisal of the subject property. TSI, an appraisal management company, is a "sister company" to Quicken as they are owned by the same parent company, Rock Holdings.[7]

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[6](...continued)

> payments, we can revisit your situation and hopefully refinance you to an even better program in the near future. First things first. Let's get this into the system and see if we can get your approval. To begin your loan, for your deposit did you want to use a Visa or Check by phone?

Additional training material included how to overcome a prospective borrower's objections to a loan. For example, when a client indicated that he or she "wants to wait," Quicken trained its employees to explain to him or her that

> Some clients in your situation are reluctant to just make a decision. Because of their credit situation they feel paralyzed, fearing they will do the wrong thing (again). This loan is the right decision because it will get you back on track to a strong credit standing and provide you with the benefit(s) of _________. I just don't want you to be one of the people who hold off thinking things will get better by themselves, and actually have things get worse. At that point there is no loan that you could qualify for.
>
> Let's make a good decision here. I want to put your loan into the system and obtain the approval that will be your first step in turning this ship around. Now, to being, for your deposit did you want to use a Visa or a MC?

[7]TSI also provides for appraisals and other "vendor items" to lenders other than Quicken.

Pursuant to its routine practice, TSI put out an automated (electronic) appraisal request order, which was shared on the internet with independent-contractor appraisers. For reasons not entirely clear from the record, TSI's appraisal request order included an estimated value for the subject property of $262,500.[8] The appraisal request order was accepted by Appraisals Unlimited, Inc. and its appraiser, Dewey Guida.[9]

Based upon his appraisal of the subject property, Mr. Guida valued it at $181,700. Quicken reviewed Mr. Guida's appraisal and approved it on May 31, 2006. The trial court concluded that not only was Mr. Guida's appraisal grossly inflated because the true fair market value of the subject property was actually $46,000, but also that Quicken's appraisal review was negligently conducted because it "ignored obvious flaws" in Mr. Guida's appraisal and "violated its own appraisal review standards and the Uniform Standards of Professional Appraisal Practice."[10]

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[8]On appeal, Plaintiff suggests that the purpose of including the estimated value on the subject property is to improperly suggest a target value to the appraiser.

[9]Although Quicken avers that with the automated appraisal request system, it "has no input whatsoever in regard to the selection of the appraiser or who the apprais[al] will be assigned to[,]" the record reveals that Mr. Guida conducted over 100 appraisals for loans made by Quicken.

[10]The circuit court found, for example, that "the pictures comparing the 'comparable properties' to the subject property . . . . appeared to be architecturally more sophisticated, in better condition and had more expensive landscaping, all of which indicated that the comparables were in a very different neighborhood." Furthermore, Mr. Guida noted the subject property's neighborhood to be downtown, but the comparables were not selected

(continued...)

Prior to approving Mr. Guida's appraisal, Quicken presented Plaintiff with a loan for $112,850, with monthly payments that were higher than what she had expected based upon the initial "pop up" advertisement. For this reason, Plaintiff became hesitant to proceed with the loan process. As a result, Plaintiff did not return telephone calls from Ms. Johnson and other Quicken employees about the loan. According to Quicken's own records, on May 30, 2006, Plaintiff

> called me back and LVM [left voice message] that she no longer wants to go through with the loan. I forwarded the VM to the MB [mortgage banker Heidi Johnson] and asked her to call me back and let me know how she would like us to proceed.[11]

(Footnote added).

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[10](...continued)
from the downtown area. The court further found that Mr. Guida noted the neighborhood price range to be $30,000 to $200,000, "with a predominant value of $65,000. Then he proceeded to appraise the Property for $181,700 with no explanation of the reasoning why the subject Property is so drastically different from the predominant home in the area. This is a violation of USPAP/industry standards and was factually inaccurate as homes do not sell for $200,000 in East Wheeling[,]" where the subject property is located.

Other flaws in the appraisal which should have raised "red flags" to Quicken's appraisal review team were the fact that the condition and age of the home listed in the appraisal were false and that Mr. Guida identified the subject property as a single unit dwelling rather than a duplex. The foregoing are just some of the flaws and standards the circuit court found that Quicken's appraisal team should have seen and should have requested an explanation from Mr. Guida.

[11]This notation was written by Quicken employee Nivin Fathella.

Even though Plaintiff had already told Quicken she did not wish to proceed with the loan, Quicken did not give up efforts to persuade her otherwise. According to Ms. Johnson's own written notation, on June 1, 2006, the day after Quicken approved Mr. Guida's $181,700 appraisal of the property, she attempted to contact Plaintiff:

> left message w/client that appraisal came in where we need and that we are ready to move forward/asked client to call back and speak w/me cause she wanted to back out/we have appraisal done now though so maybe I can save?

Quicken's records further indicate that Ms. Johnson tried to contact Plaintiff again on June 2 and June 5, 2006; following the latter attempt, Ms. Johnson noted the following: "have called and left numerous messages/client is not responding to me/if I don't hear back by Tues. I will have to kill it and we just charge her for the appraisal."

Ultimately, Plaintiff agreed to the loan on June 6, 2006, as indicated in the following notation by Ms. Johnson: "Client finally reached me/she was being swayed by a broker and that's why she wanted to back out/client very timid[12] and I just had to spend a lot of time explaining to her being taken advantage of/Adding more cash out and taking up to full 80% LTV [loan to value] and will have closure today."[13] (Footnotes added).

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[12]In a subsequent email to a co-worker, Ms. Johnson indicated that she has been "handling [Plaintiff] with kid gloves because she is very fragile[.]"

[13]As previously indicated, Ms. Johnson offered Plaintiff the loan amount of $144,800 after the appraisal of $181,700 conducted by Mr. Guida was approved by Quicken.
(continued...)

For her part, Plaintiff testified that when she conveyed her hesitation to consummate the loan to Ms. Johnson,

> She told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got – everything started to be paid off, then I would be able to refinance my loan."

(A925) Indeed, Plaintiff testified that she believed and trusted Ms. Johnson and that the promise to refinance "was one of the main factors in my decision to do it . . . . because I knew I couldn't keep up that type of payment for a long period of time, especially with a decreased income."[14]

As indicated above, the loan originally presented to Plaintiff, and for which she received a written "Good Faith Estimate," was in the amount of $112,850. The loan was an interest-only loan for the first three years and also provided for Plaintiff to purchase 2.5 "loan

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[13](...continued)
The evidence at trial revealed that Quicken pays commissions to its employees based upon the amount of the loan, the number of loans closed per month and the type of loan. In Plaintiff's case, she received a subprime loan, which pays a higher commission than do prime loans. Commissions to Quicken employees are paid monthly. Ms. Johnson's commission in the case of Plaintiff's loan was $834.40.

[14]Plaintiff testified that the decrease in income refers to the fact that child support payments Plaintiff had been receiving at that time were about to come to an end apparently when her son turned eighteen years old.

discount points"[15] resulting in a variable interest rate of 8.5% and an initial payment of $799 per month. This loan had no balloon payment feature.

In contrast, the loan at issue herein was for the much larger amount of $144,800, and was otherwise quite different from the original loan described above. Under the terms of this loan, the annual interest rate was 9.25% for the first three years and then adjusted every six months thereafter, to a maximum rate of 16.25% and a minimum of 7.75%. Thus, Plaintiff's monthly payment for the first three years was $1,144, excluding taxes and insurance.[16] This was a monthly savings to Plaintiff (for the first three years) in the amount of $316.[17] This loan product was unique because it was a thirty-year loan that was amortized over forty years, resulting in a $107,015.71 balloon payment at the end of the loan period. It is undisputed that Quicken did not provide Plaintiff with a written "Good Faith Estimate"

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[15]As explained by Plaintiff's expert Margot Saunders, "loan discount points" are additional amounts of money paid up front by borrowers to buy down the interest rate of a loan which, in turn, lowers the monthly loan payment.

[16]Comparatively, Plaintiff's previous mortgage with CitiFinancial had a thirty-year fixed rate of 9.75% and a monthly payment of $578. Plaintiff's other debt, which was consolidated with the CitiFinancial mortgage under the Quicken loan, was unsecured.

[17]However, according to Quicken's own financial expert, beginning two years and five months into the loan, Plaintiff no longer saved money as compared to her previous mortgage and other debt. Furthermore, after five years (or 60 payments), Plaintiff's monthly payment would be $1,582, as compared to the combined monthly payment for her previous mortgage and other debt, which would have been $578.

for this loan after the loan was so drastically revised[18] to include, among other things, the balloon payment that was almost twice as large as the actual fair market value of the subject property.[19]

One or two days before the loan was scheduled to close, a packet consisting of eighty-one pages of closing documents was delivered to Plaintiff at her home. According to Plaintiff, she did not open the packet prior to the closing. The closing occurred at Plaintiff's home (the subject property) on July 7, 2006, and was attended only by Plaintiff and a notary public unaffiliated with Quicken. According to Plaintiff, when the notary arrived, he opened the packet and told her to sign the documents having red "sign here" stickers already on them. Plaintiff testified that the notary "basically was waiting for me to sign them, and then he would stamp some of them[;]" that she attempted to ask him questions about what some of the documents meant, but that he said she would have to speak with someone at Quicken because he did not know the answers; and that the process was all "kind of hurried and rushed when we went through the paperwork." Indeed, the loan closing took approximately fifteen

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[18]According to Ms. Saunders, the federal Real Estate Settlement Procedures Act (RESPA) requires that a good faith estimate be provided when there is a new loan product with different closing costs to be charged.

[19]In the case of Plaintiff's loan, after making 360 loan payments ranging from $1,144 to $1,582 and totaling $550,084, Plaintiff, who, at all times relevant, earned $14.36 per hour as a licensed practical nurse, was required to make a single balloon payment of $107,015.71 to avoid foreclosure.

minutes to complete. Plaintiff admitted that she did not closely review the closing documents in any detail.

As discussed in more detail below, from this Court's review of the record, it appears that the closing documents disclosed that there was "a large balloon payment." However, the actual and precise amount of the balloon payment was not otherwise disclosed therein. Plaintiff admitted that she saw the term "balloon payment" during the closing. She testified that

> I believe I saw that on the paper. I wasn't exactly sure what it meant, though. It really – I don't know. I can't say it didn't concern me; it did. But the fact that we were going to be refinancing in three to four months was what I was mainly –."

Additionally, as set forth in the HUD Settlement Statement document also presented to Plaintiff for her signature at closing, Quicken ostensibly charged Plaintiff four "loan discount points" amounting to $5,792. However, at the time Plaintiff's loan was offered, the maximum number of loan discount points available on a loan with a 9.25% initial interest rate such as hers was 2.5 points. Thus, although Quicken represented to Plaintiff that she purchased four loan discount points,[20] she only actually purchased 2.5 points. (That is, $3,692 of the total $5,792 loan discount fee paid by Plaintiff actually resulted in a reduction

[20]In a June 26, 2006, email from Ms. Johnson to a co-worker, she stated that Plaintiff "knows that she is buying the rate way down to keep her payment lower. She's very worried and I told her not to be we can still do this."

in the interest rate.) Unbeknownst to Plaintiff, therefore, $2,100 (i.e., 1.5 points worth) of the $5,792 she believed she was paying Quicken to "buy down" her interest rate resulted in no such benefit to her.

Plaintiff presented evidence at trial that, under Quicken's own policies, Ms. Johnson had the discretion to charge the additional $2,100 fee, from which she received a share:

> (i) General Rule – As a general rule, Mortgage Bankers are required to adhere to Quicken Loans published daily rates in quoting rates, points, fees and programs to prospective clients.
>
> (ii) Premiums – Mortgage Bankers shall have the discretion to charge a rate/point/fee structure that exceeds the daily price sheet on certain products, provided that the price charged does not exceed the daily price sheet price by more than two points. The additional revenue resulting from the Mortgage Banker's proper exercise of such discretion is considered the 'premium' for purposes of Section I B above.

It is Plaintiff's contention that Ms. Johnson charged her such a "premium" in the amount of $2,100 but falsely represented to her that she was receiving a corresponding reduction in the interest rate on her loan.

Quicken argued, however, that regardless of how the fee was represented to Plaintiff on the closing documents, Quicken would still have charged Plaintiff the excess fee up front because Plaintiff had become delinquent on her existing mortgage with CitiFinancial

and as a result, became a greater credit risk to Quicken. Quicken's explanation notwithstanding, the circuit court found that "[t]he manipulation of the increase of 1.5 percent 'discount points' misrepresented to [Plaintiff] that her interest rate would be reduced."

With the loan proceeds, Plaintiff paid off her previous mortgage and consolidated debt; received $40,768.78, with which she purchased a new vehicle (for $28,536.90)[21]; retired other existing debt; and made the first two payments on the loan.[22] After making timely September and October payments, Quicken's telephone calling records indicate that, beginning in early October 2006, Plaintiff made numerous attempts to contact Quicken. According to Plaintiff, the purpose of her repeated efforts was to begin the

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[21]According to Plaintiff, the extra cash was initiated by Quicken. She testified that,

> [w]ell, she [Ms. Johnson] – when she got the appraisal done, she said that it came in at $181,000, I believe. And she said that – she said: is there anything else that you're going to need because you have this money available to you?
>
> And I kind of thought about it at the time because, once I did the loan, I wasn't really going to have any money available to do anything extra with. And I had an SUV at the time that really cost me a lot of money in gas, and I decided to get a car that was going to last me for a while.

[22]Under the terms of the loan, the first payment was due September 1, 2006.

refinancing process, as promised by Ms. Johnson when Plaintiff agreed to the loan. Quicken refused to refinance the loan.[23]

Thereafter, in January 2007, Plaintiff was required to undergo surgery and, due to complications, underwent a subsequent emergency surgery. As a result, Plaintiff was unable to work for a time and ultimately, defaulted on the loan. Her repeated requests of Quicken, both by telephone and in writing, to work out a payment arrangement in light of her situation were refused.

According to Plaintiff, in August 2007, she provided statutory notice of a claim and afforded Quicken a right to cure under West Virginia Code §46A-6-106(b) (2005) (Repl. Vol. 2006). However, no cure offer was made and Quicken began foreclosure proceedings.

Plaintiff filed suit against Quicken, Appraisals Unlimited, Inc., appraiser Dewey Guida,[24] and John Doe Note Holder[25] in the Circuit Court of Ohio County, alleging that she

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[23]Quicken denied Plaintiff's request to refinance sometime in October 2006, before Plaintiff's November payment was due on November 1st. Plaintiff did not make the November payment until January 16, 2007.

[24]The parties represent that Plaintiff settled with Mr. Guida and Appraisals Unlimited prior to trial for the amount of $700,000.

[25]Plaintiff alleged that "John Doe Note Holder is the current holder of [Plaintiff's] loan" who had not been identified when the complaint herein was filed. (continued...)

was the victim of a predatory lending scheme and consumer fraud relating to the loan at issue. Following a six-day bench trial, the circuit court entered an order on February 25, 2010, in which it found that Quicken committed fraud and violated various provisions of the West Virginia Consumer Credit and Protection Act, including West Virginia Code §46A-2-121 (1996), regarding unconscionability; West Virginia Code §46A-6-102(7)(K)(L)(M) and (N) (2005) and §46A-6-104 (1974), regarding unfair and deceptive acts; and West Virginia Code §46A-2-105 (1974), regarding illegal balloon notes. The circuit court further found that Quicken violated West Virginia Code §31-17-8(m)(8) (2002) (Repl. Vol. 2009), regarding illegal appraisals.[26] The relevant findings and conclusions of the circuit court will be more fully discussed below in connection with Quicken's specific assignments of error.

The circuit court further concluded that the Note and Deed of Trust were unenforceable as a matter of law; awarded restitution of payments made by Plaintiff to Quicken in the amount of $17,476.72; ordered Quicken and its successors and assigns to take action consistent with the court's order to reflect the termination of the Deed of Trust; and enjoined them from attempting to collect any future payments under the loan. Notably, the

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[25](...continued)
According to the evidence at trial, Quicken originates loans but does not service them. Rather, it sells "100%" of them to investment banks on Wall Street, which then securitize them into trusts and sell them to large corporate investors.

[26]Plaintiff also filed a claim for breach of the covenant of good faith and fair dealing, which the trial court found "has not been applied to a lender/borrower relationship in West Virginia" and therefore was not addressed by the court.

circuit court did not order Plaintiff to repay the loan principal thereby effectively canceling Plaintiff's loan obligation.

A subsequent trial was conducted on September 1, 2010, on the issue of attorneys fees and punitive damages. Upon the conclusion thereof, the circuit court entered an order on February 17, 2011, in which it awarded Plaintiff attorneys fees and litigation costs in the total amount of $596,199.89, and punitive damages in the amount of $2,168,868.75.

Quicken's post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law and Motion for Offset of Judgment Pursuant to Settlement of Defendant Dewey V. Guida were summarily denied by the circuit court's order entered May 2, 2011. This appeal followed.

II. Standard of Review

It is well settled that

> [i]n reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. pt. 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

III. Discussion

A. Fraud

In its first assignment of error, Quicken asserts that the circuit court erred in finding that Plaintiff proved, by clear and convincing evidence, that Quicken fraudulently induced Plaintiff to enter into the loan. The circuit court concluded that Quicken committed fraud by not only failing to disclose the enormous balloon payment prior to the closing but also by failing to properly disclose it at the closing; by falsely promising Plaintiff that it would refinance her loan in three to four months after closing; and by misrepresenting to her the extent to which she was buying down the interest rate on the loan.

This Court has consistently described the elements of fraud as follows:

> "'[t]he essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, (1927).' Syl. Pt. 1, *Lengyel v. Ling*, 167 W.Va. 272, 280 S.E.2d 66 (1981)." Syllabus Point 5, *Kidd v. Mull*, 215 W.Va. 151, 595 S.E.2d 308 (2004).

Syl. Pt. 5, *Folio v. City of Clarksburg*, 221 W.Va. 397, 655 S.E.2d 143 (2007). Furthermore, allegations of fraud must be established by clear and convincing evidence. Syl. Pt. 5, *Tri-State Asphalt Products, Inc. v. McDonough Co.*, 182 W.Va. 757, 391 S.E.2d 907 (1990).

1. Balloon Payment

The evidence at trial revealed that the loan as originally presented to Plaintiff (for $112,850) did not include a balloon payment of any kind, as indicated in the written Good Faith Estimate provided to Plaintiff. In sharp contrast, the loan at issue included an enormous balloon payment. However, Quicken failed to provide Plaintiff with a written Good Faith Estimate for the revised loan, which would have set forth this very critical loan term for Plaintiff to consider.

Moreover, as the circuit court found, the $107,015.71 balloon payment was not conspicuously disclosed on the note as required by West Virginia law. This finding is undisputed by Quicken. West Virginia Code §46A-2-105 very clearly requires that

> whenever any scheduled payment is at least twice as large as the smallest of all earlier scheduled payments other than any down payment any writing purporting to contain the agreement of the parties shall contain the following language typewritten or printed in a conspicuous manner. THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS: Followed, if there is only one installment which is at least twice as large as the smallest of all earlier scheduled payments other than any down payment, by: AN INSTALLMENT OF $.............WILL BE DUE ON .... or, if there is more than

> one such installment, by: LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS: (The amount of every such installment and its due date shall be inserted)."

Id. *See Mallory v. Mortgage America*, 67 F.Supp.2d 601, 608 (S.D.W.Va. 1999) ("With respect to §46A-2-105(2), the legislature used the word 'shall,' and there being no language within the statute indicating an intent to the contrary, the court construes the statute as mandatory...[and] strict compliance is required.").

It is Quicken's contention that, despite its failure to comply with the foregoing statutory requirement, the balloon payment was described "in detail" in the following closing documents delivered to Plaintiff prior to closing: the "3/6 Adjustable Rate/Balloon Mortgage Disclosure," the "Adjustable Rate Rider," and the "Adjustable Rate: Balloon Note."

This Court's review of the "3/6 Adjustable Rate/Balloon Mortgage Disclosure" reveals that the extent of the "Balloon Payment" section in that document is as follows:

> BALLOON PAYMENT. With this loan program, you will make 360 monthly payments of principal and interest. The amount of those monthly payments will be based on a 40 year repayment schedule, your interest rate and the amount of your loan. Since this loan is based on a repayment schedule that is longer than your loan term, your last payment at the end of 30 years will be a large balloon payment. At least ninety days before the end of your loan, you will receive notice that your

loan balance is due and when you must pay the balance in full.

The "Adjustable Rate Rider" and the "Adjustable Rate Balloon Note" documents are even less descriptive. Both of those documents include language that is very similar to that which was set forth in the "3/6 Adjustable Rate/Balloon Mortgage Disclosure" document, above, but *neither* describes the balloon payment due and payable as "large." Rather, the "Adjustable Rate Rider" and the "Adjustable Rate Balloon Note" documents provide only that "THERE WILL BE DUE AND PAYABLE ON THE MATURITY DATE OF THIS NOTE A FINAL BALLOON PAYMENT OF THE THEN OUTSTANDING PRINCIPAL BALANCE PLUS ALL ACCRUED AND UNPAID INTEREST." To be clear, nowhere in the closing documents signed by Plaintiff at the July 7, 2006, closing does the balloon payment amount of $107,015.71 appear.[27]

Not surprisingly, the foregoing documents are, under any standard, very complicated and include sophisticated terms and concepts that require specialized knowledge. Despite the complex nature of the closing documents, Quicken did not send a representative to the closing who could answer Plaintiff's questions or point out to her that the loan has a

[27]We note that the amount of the balloon payment and its due date were set forth on the Federal Truth in Lending Statement but, for reasons that are unclear from the record, it appears that Plaintiff was not presented with this document prior to or on the date of closing. Rather, she signed it at a later date. Quicken does not argue on appeal that this document disclosed to Plaintiff prior to or at the July 7, 2006, closing that the amount of the balloon payment was $107,015.71.

balloon payment which amounted to $107,015.71. To the contrary, Quicken's position with regard to its failure to disclose the $107,015.71 balloon payment was summed up during oral argument before this Court when its counsel maintained that the amount of the balloon payment was a "math product," thereby suggesting Plaintiff should have simply calculated the amount of the balloon payment on her own.[28]

Quicken's arguments notwithstanding, the mandatory statutory requirement that the loan agreement "contain the language essentially as set out in the statute and in the conspicuous manner illustrated" therein serves the very reasonable and important purpose of advising borrowers in no uncertain terms that, at some point during the course of the loan, a balloon payment of a precise amount will be due and owing to the lender on an equally precise date. *Mallory*, 67 F.Supp.2d at 609. The Court in *Mallory* specified that West Virginia Code §46A-2-105(2) "was designed to bring home to the borrower the extraordinary payment that must some day be met." 67 F.Supp.2d at 609.

In light of the foregoing, we now proceed to determine if the circuit court properly concluded that Quicken's above-described conduct with regard to its failure to

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[28]Indeed, calculating the amount of the monthly payments and the amount of the balloon payment would not have been an easy task for the average borrower. Although Plaintiff's initial monthly payment of $1,114 and initial interest rate of 9.25% appeared in the closing documents, the subsequent changes to the monthly payment involved a complicated calculation.

properly disclose the enormous balloon payment due on the loan was an act of fraud. This Court has recognized that "[f]raudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead." *Trafalgar House Constr. v. ZMM, Inc.*, 211 W.Va. 578, 584, 567 S.E.2d 294, 300 (2002) (*citing Silva v. Stevens*, 589 A.2d 852, 857 (1991)). Thus, this Court has recognized that "‘"an action for fraud can arise by the concealment of truth."’" *Smith v. First Community Bancshares, Inc.*, 212 W.Va. 809, 822, 575 S.E.2d 419, 432 (2002) (internal citations omitted). Indeed, "‘[f]raud is the concealment of the truth just as much as it is the utterance of a falsehood.’ *Frazer v. Brewer*, 52 W.Va. 306, 310, 43 S.E. 110, 111 (1902)." *Id*.

It is undisputed that the reason Plaintiff sought to refinance was to consolidate her debt and reduce her monthly payments – in short, to save money. Concealing such an enormous balloon payment from Plaintiff was designed to mislead her and to induce her into entering into the loan and, in fact, that is precisely what occurred. With regard to Plaintiff's reliance on Quicken's concealment of the exorbitant balloon payment amount, "‘[i]t is not necessary that the fraudulent [concealment]...should be the sole consideration or inducement moving the plaintiff. If the [concealment] contributed to the formation of the conclusion in the plaintiff's mind, that is enough[.]’" *Trafalgar House*, 211 W.Va. at 585, 567 S.E.2d at 301 (*quoting* syl. pt. 3, *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927)). Accordingly,

this Court finds that the circuit court properly concluded that Quicken committed fraud with regard to its failure to properly disclose to Plaintiff the amount of the balloon payment due on the loan and that Plaintiff proved this failure by clear and convincing evidence.

2. Promise to Refinance

As previously indicated, Plaintiff testified that upon seeing the term "balloon payment" in the loan documents, she became "concerned." She further testified that she did not know exactly what the term meant. Indeed, as already established, the amount of the balloon payment was fraudulently concealed. Plaintiff testified that she knew she would be unable to keep up with the monthly payments for a long period of time especially because the child support payments she was then receiving would soon be ending. According to Plaintiff, she went forward with the loan because Quicken promised that she could refinance in three to four months after closing. Though Quicken denies that it made such a promise to refinance, the evidence at trial revealed that precisely three months after the closing – after she had timely made her September and October mortgage payments – Plaintiff made repeated attempts to contact Quicken. Plaintiff's attempts to contact Quicken at that time are clearly consistent with Quicken's promise to refinance three to four months after closing. The circuit court concluded that her attempts to contact Quicken were for the purpose of beginning the refinancing process.[29]

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[29]Quicken concedes that, according to Quicken representative Anthony (continued...)

Quicken's fraudulent misrepresentation to Plaintiff that it would refinance the loan in three to four months was clearly material because, absent that promise, Plaintiff would not have otherwise entered into the loan.[30] Given these facts, this Court finds that the circuit court properly concluded that Plaintiff proved by clear and convincing evidence that Quicken falsely promised Plaintiff that it would refinance her loan in three to four months after closing and that Plaintiff was justified in relying on that promise.

3. Loan Discount Points

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[29](...continued)
Nuckolls , a client could, in fact, refinance a loan after a four-month period if, among other things, the client had made timely payments on the loan. Quicken contends that *if* it promised to refinance Plaintiff's loan, Plaintiff breached the alleged bargain because she "did not make her loan payments for four months, as required under her own version of the supposed promise."

Quicken's argument in this regard misstates the evidence. Plaintiff's testimony was not that Quicken promised to refinance after Plaintiff made four timely payments on the loan. Rather, Plaintiff testified that Quicken promised to refinance "in three to four months," at which time Plaintiff "could get it at a cheaper rate" and "once that loan was in place and I got – everything started to be paid off, then I would be able to refinance my loan." Plaintiff closed on the loan on July 7, 2006, and three months later, after she timely made her September and October payments, she promptly began efforts to contact Quicken to begin the refinancing process.

[30]Quicken briefly argues that even if it had promised to refinance, there is no evidence that the promise was false or made with fraudulent intent. Not unlike this Court's decision in *Traders Bank v. Dils*, 226 W.Va. 691, 704 S.E.2d 691 (2010), this case "involves the exception to the general rule that fraud cannot be predicated on a promise not performed. This exception . . . comes into play where the device used to accomplish the fraud is the promise itself." *Id*. 226 W.Va. at 695, 704 S.E.2d at 695. Indeed, "[t]he critical element of a fraudulent inducement claim is an oral promise that is used as an improper enticement to the consummation of another agreement." *Id*. 226 W.Va. at 696, 704 S.E.2d at 696.

It is undisputed that Quicken charged Plaintiff $5,792 for four loan discount points to buy down the interest rate on the loan. It is further undisputed that, in fact, Plaintiff purchased only 2.5 points because, at the time the loan was offered, 2.5 points were the maximum number of loan discount points available on a loan such as Plaintiff's. Thus, of the $5,792 Plaintiff paid Quicken to ostensibly buy down her interest rate, $2,100 of that amount (or 1.5 points worth) resulted in no such benefit to her. In reality, the facts established in the circuit court below indicated that Quicken charged Plaintiff a $2,100 "premium," which was an additional fee Quicken mortgage bankers were permitted, in their discretion, to charge clients.

The circuit court concluded that "[t]he manipulation of the increase of 1.5 percent 'discount points' misrepresented to [Plaintiff] that her interest would be reduced." (FOF 43). On appeal, Quicken argues that even if a portion of the loan discount points should have been labeled differently, there was no evidence presented at trial which proved that if the loan discount had been accurately described on the closing documents, Plaintiff would not have consummated the loan. In other words, Quicken argues, there was no evidence that Quicken's misrepresentation as to the loan discount points being charged were either material or relied upon by Plaintiff such that the misrepresentation was an act of fraud.

This Court's review of the record indicates that Quicken misrepresented to Plaintiff the extent to which she was buying down her interest rate. It charged her $2,100 for

a benefit she never received. Quicken's claim that it would have charged Plaintiff this extra fee anyway based upon the fact that she was a high credit risk in no way legitimizes its actions, which this Court finds to be distasteful and opportunistic. Nevertheless, an action in fraud requires that Plaintiff prove that she relied upon the misrepresented discount points when she entered into the loan. From our review of the evidence, we agree with Quicken that clear and convincing evidence in this regard was not presented.

Although we do not find that the elements of fraud were met with regard to the misrepresentation of the loan discount points, we otherwise affirm the circuit court's rulings that the evidence relating to the concealment of the balloon payment and promise to refinance were acts of fraud and were proven by clear and convincing evidence.

B. Unconscionability under West Virginia Code §46A-2-121

Quicken also asserts that the circuit court committed error in concluding that, under West Virginia Code §46A-2-121, the loan to Plaintiff was induced by unconscionable conduct; included several unconscionable terms; and was, in and of itself, an unconscionable loan product.

This Court has recognized "unconscionability" to be a "general contract principle, based in equity." *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229,

234, 511 S.E.2d 854, 859 (1998), *overruled, in part, on other grounds*, *Dan Ryan Builders, Inc. v. Nelson*, __ W.Va. __, __ S.E.2d __ (No. 12-0502) (Nov. 15, 2012).

As this Court held in syllabus point three of *Arnold*,

> "'The legislature in enacting the West Virginia Consumer Credit and Protection Act, W.Va. Code 46A-1-101, *et seq.*, in 1974, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act. To further this purpose the legislature, by the express language of W.Va. Code 46A-5-101(1), created a cause of action for consumers and imposed civil liability on creditors who include unconscionable terms that violate W.Va. Code, 46A-2-121 in consumer agreements.' Syl. pt. 2, *U.S. Life Credit Corp. v. Wilson*, 171 W.Va. 538, 301 S.E.2d 169 (1982)." Syl. pt. 1, *Orlando v. Finance One of West Virginia, Inc.*, 179 W.Va. 447, 369 S.E.2d 882 (1988).

West Virginia Code §46A-2-121 provides, in relevant part, that

> (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:
>
> (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or
>
> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

The Act does not define the term "unconscionable." However, in past cases, this Court has relied on the definition provided in the Uniform Consumer Credit Code ("Consumer Credit Code"), the unconscionability provisions of which are identical to West Virginia Code §46A-2-121(1)(a) and (b). *Arnold*, 204 W.Va. at 234, 511 S.E.2d at 860; *Herrod v. First Republic Mortgage Corp., Inc.*, 218 W.Va. 611, 617, 625 S.E.2d 373, 379 (2005); *Orlando v. Finance One of West Virginia, Inc.*, 179 W.Va. 447, 369 S.E.2d 882 (1988). As a result, we found the drafters' comments to the Consumer Credit Code to be highly instructive, recognizing that

> "'the principle of unconscionability "is one of the prevention of oppression and unfair surprise and not the disturbance of reasonable allocation of risks or reasonable advantage because of superior bargaining power or position." See Uniform Consumer Credit Code, section 5.108 comment 3, 7A U.L.A. 170 (1974).'"

Arnold, 204 W.Va. at 235, 511 S.E.2d at 860 (internal citation omitted). *See Herrod*, 218 W.Va. at 617, 625 S.E.2d at 379.

According to the drafters of the Consumer Credit Code,

> "The basic test is whether, in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct or contract, the conduct involved is, or the contract or clauses involved are so one sided as to be unconscionable under the circumstances existing at the time the conduct occurs or is threatened or at the time of the making of the contract."

Arnold, 204 W.Va. at 235, 511 S.E.2d at 860 (*quoting Orlando,* 179 W.Va. at 450, 369 S.E.2d at 885). *See Herrod,* 218 W.Va. at 617, 625 S.E.2d at 379.

Furthermore, the drafters explained that "'[t]he particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others.'" *Arnold*, 204 W.Va. at 235, 511 S.E.2d at 860 (*quoting Orlando*, 179 W.Va. at 450, 369 S.E.2d at 885). *See Herrod,* 218 W.Va. at 617, 625 S.E.2d at 379.

Importantly,

> "'[a] bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in allocation of risks to the weaker party. But gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, or did not in fact assent or appear to assent to the unfair terms.'"

Arnold, 204 W.Va. at 235, 511 S.E.2d at 860 (*quoting Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va, 599, 604, 346 S.E.2d 749, 753 (1986)).

Accordingly, this Court held in syllabus point 4 of *Arnold*, that "'[a] determination of unconscionability must focus on the relative positions of the parties, the

adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and "the existence of unfair terms in the contract.' Syl. pt. 4, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991)."

As indicated above, the circuit court determined that the loan was induced by Quicken's unconscionable conduct, that the loan included several unconscionable terms, and that the loan product, in and of itself, was unconscionable.

With regard to unconscionability in the inducement, the circuit court in the present case concluded that the unconscionable conduct of Quicken included "[t]he false promise of refinancing; [i]ntroducing a balloon payment feature at closing; [f]ailing to properly disclose the balloon payment; [f]alsely representing that the plaintiffs were buying the interest rate down; and [n]egligently conducting the appraisal review and failing to realize the highly inflated appraisal from Guida[.]"

In arguing that the circuit court committed error in concluding that the loan was induced by its unconscionable conduct, Quicken reiterates its previous argument that the loan was not fraudulently induced. *See One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) (stating that "W.Va. Code, 46A-2-121 [1974], expressly deals with conduct that is 'unconscionable' which we have equated with fraudulent

conduct." (Footnote omitted)). Having already determined that Quicken acted fraudulently in inducing Plaintiff into entering into the loan, we therefore conclude that there is no merit to Quicken's contention that it did not violate West Virginia Code §46A-2-121 in this regard.

The circuit court further determined that the loan product, in and of itself, is unconscionable and that it "contains several unconscionable terms," including loan discount points of $5,792, without a fully corresponding reduction in the interest rate or any benefit to Plaintiff[31]; a $107,015.71 balloon payment that was not properly disclosed under West Virginia Code §46A-2-105(2); and a loan which was based on an inflated appraisal of $181,700 "when the proper fair market value of the Property was $46,000." Finally, the circuit court found that Quicken converted Plaintiff's previously-unsecured debt of approximately $25,000 into secured debt and, upon consolidating the secured debt with her outstanding mortgage to CitiFinancial, "raised her secured monthly debt obligation from $578 to $1,114, thus, putting [Plaintiff's] home at risk. The net effect of this conversion is unconscionable."[32] (Footnote added).

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[31]More specifically, as previously discussed, $2,100 of the $5,792 Quicken charged Plaintiff in loan discount points did not have a corresponding reduction in the interest rate.

[32]Although the circuit court also concluded that the "excessive closing costs of $8,889" were unconscionable (which costs included fees to Quicken of $5,792 and $575), the court's order does not discuss the loan's closing costs other than in the context of the loan discount points.

It is Quicken's contention that a bargain is unconscionable only when it is so one-sided as to have an overly harsh effect on the disadvantaged party and lead to absurd results. Quicken challenges the circuit court's findings and conclusions arguing that the court failed to weigh the clear and immediate benefits of the loan to Plaintiff. Such benefits, according to Quicken, included a large cash payout with which Plaintiff purchased a new car and satisfied other debt, reduced monthly payments, and a reduced interest rate.

Plaintiff counters that the lower interest rate and lower monthly payment resulting from the loan were temporary because they were good only for three years and were far outweighed by the exorbitant cost of the loan. The loan converted Plaintiff's previous 9.75% fixed rate mortgage with CitiFinancial into a variable rate ranging from 7.75% to 16.25%. According to Plaintiff, who was earning $14.36 per hour at the time she applied for and received the loan, her mortgage payment would have equaled $1,582 per month (excluding taxes and insurance) at the highest rate.

Plaintiff argues that, as evidence of just how short-lived any savings to Plaintiff would be, Quicken's own financial expert testified that beginning only two years and five months into the loan, Plaintiff's monthly payments would no longer save her money as compared to Plaintiff's previous mortgage payment and other (unsecured) debt, which the Quicken loan consolidated. In fact, as previously noted, Quicken's expert testified that in

year five of the loan, the monthly payment would be $1,582, whereas the combined monthly payment for Plaintiff's previous mortgage and other debt would have been $578. Plaintiff points out that, in total, the cost of the Quicken loan, when compared to Plaintiff's prior mortgage and prior debts, was an additional $349,000 in monthly payments.

Furthermore, Plaintiff argues that in consolidating her debt, Plaintiff's formerly unsecured debt was now secured under the Quicken loan. Plaintiff contends that, given her well-documented poor credit history, income and financial obligations, it was unconscionable for Quicken to secure all of her debt and to thereby jeopardize her family's home.[33]

As set forth above, in determining unconscionability, this Court "must focus on the relative positions of the parties, the adequacy of the bargaining positions, the meaningful alternatives available to the Plaintiff, and the 'existence of unfair terms in the contract.'" *Arnold*, at syl. pt. 4. This is not a close case. Plaintiff was a single mother to three children who earned $14.36 an hour and who had a well-documented poor credit history. She was not a sophisticated borrower. Quicken's own records describe her as "timid," "fragile" and needing to be handled with "kid gloves." When Plaintiff declined the original $112,000 loan because the payments were too high, Quicken continued to pursue her. It tried to contact

[33]With regard to the cash she received under the loan, with which she purchased a new car, Plaintiff contends that the offer of cash was initiated by Quicken after it approved the grossly-inflated appraisal from Mr. Guida.

her numerous times especially after Mr. Guida's appraisal came in at almost four times the actual fair market value of the property.

Furthermore, as previously established, the loan contained a $107,015.71 balloon payment (of which Plaintiff was not aware prior to closing). The total cost of the loan was exorbitant, costing Plaintiff an additional $349,000 in monthly payments as compared to her prior mortgage and debts. From this and all of the evidence presented at trial, we conclude that the circuit court correctly found that, given the particular facts involved in this case, the terms of the loan described above and the loan product, in and of itself, were unconscionable.

C. Cancellation of the Loan Obligation (Loan Principal)

Quicken's next assignment of error is that the circuit court lacked the legal authority to cancel Plaintiff's obligation to repay the $144,800 loan principal. It is Quicken's contention that the legislature has strictly limited the circumstances under which this remedy may be awarded under the West Virginia Consumer Credit and Protection Act and that those circumstances are absent in the case sub judice. We agree.

Cancellation of debt is a permissible remedy under the following two provisions of the Act: West Virginia Code §46A-5-101(2) (1996) and §46A-5-105 (1994). West Virginia Code §46A-5-101(2) provides, in relevant part, that

> [i]f a creditor has violated the provisions of this chapter respecting authority to make regulated consumer loans, the loan is void and the consumer is not obligated to pay either the principal or the loan finance charge.

This statute specifically applies to "regulated consumer loans," which term is defined in West Virginia Code §46A-1-102(38) (1996) as "a consumer loan . . . in which the rate of the loan finance charge exceeds eighteen percent per year[.]" It is undisputed that the loan at issue is not a "regulated consumer loan," and thus, West Virginia Code §46A-5-101(2) does not apply to give the circuit court the authority to cancel the loan such that Plaintiff is not obligated to repay the principal.

Likewise, West Virginia Code §46A-5-105 provides that

> [i]f a creditor has willfully violated the provisions of this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, in addition to the remedy provided in section one hundred one [§46A-5-101] of this article, the court may cancel the debt when the debt is not secured by a security interest.

In this case, although it has been determined that Quicken violated the provisions of Chapter 46A "applying to illegal, fraudulent or unconscionable conduct or any

prohibited debt collection practice," Plaintiff's debt may only be canceled under West Virginia Code §46A-5-105 if it "is not secured by a security interest." Plaintiff's loan debt is, of course, secured by a security interest. Thus, West Virginia Code §46A-5-105 does not apply.

Although the foregoing statutory requirements were not met in this case, the circuit court canceled the debt under the illegal appraisal, unconscionability, and unfair and deceptive acts provisions of the Act, and under the common law fraud claim. We will discuss each in turn.

1. Illegal appraisal

The circuit court concluded that Quicken violated that portion of the illegal appraisal statute, West Virginia Code §31-17-8(m)(8), which states as follows:

> (m) In making any primary or subordinate mortgage loan, no licensee may, and no primary or subordinate mortgage lending transaction may, contain terms which:
>
> . . . .
>
> (8) Secure a primary or subordinate mortgage loan in a principal amount that, when added to the aggregate total of the outstanding principal balances of all other primary or subordinate mortgage loans secured by the same property, exceeds the fair market value of the property on the date that the latest mortgage loan is made. For purposes of this paragraph, a broker or lender may rely upon a bona fide written appraisal of the property made by an independent third-party appraiser, duly licensed or certified

> by the West Virginia real estate appraiser licensing and certification board and prepared in compliance with the uniform standards of professional appraisal practice[.]

As previously described, Dewey Guida, an appraiser who was unaffiliated with Quicken, appraised the subject property for $181,700. The circuit court found that Mr. Guida's appraisal was grossly inflated because the actual fair market value of the property was $46,000. In its February 25, 2010, order, the court set forth numerous "obvious flaws" that Quicken's appraisal review team ignored with regard to Mr. Guida's appraisal and further found that Quicken violated its own appraisal review standards and the Uniform Standards of Professional Appraisal Practice. See n.10, *infra*.

The circuit court concluded that

> [t]he net effect of the *negligently* performed appraisal review is that all the errors of omission and commission caused a misleading and distorted report that should not have been used as a basis for approving this loan. The misleading appraisal, which was *negligently* performed, gave [Plaintiff] a false sense as to her ability to repay this loan.
>
> It was the intention of Quicken Loans, after the closing of this loan, to not service the loan but instead sell the loan to a third-party. The *negligently* performed appraisal review facilitated the sale of this loan by giving any third-party purchaser a false sense as to the value of the Property.

(Emphasis added).

Pursuant to West Virginia Code §31-17-17(a) (l967), a court may cancel a loan made in violation of the provisions of West Virginia Code §31-17-1, *et seq*., if the violation is "willful." West Virginia Code §31-17-17(a) states:

> If any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan may be canceled by a court of competent jurisdiction.

Because the circuit court found Quicken's violation of West Virginia Code §31-17-8(m)(8) to have been negligent rather than willful, the court committed error in canceling Plaintiff's mortgage obligation under that particular statute.

2. Unconscionability

As previously indicated, West Virginia Code §46A-2-121(1)(a) and (b) provides that when a consumer loan is found to be unconscionable, a court may, among other things, "refuse to enforce the agreement[.]" It is Quicken's contention that refusal to enforce the agreement does not allow the court to cancel Plaintiff's debt. Quicken compares the language in West Virginia Code §46A-2-121(1) with that contained in West Virginia Code §46A-5-101(2), which, as previously discussed, provides that when a creditor violates the statutory provisions governing regulated consumer loans, "the loan is void and the consumer is not obligated to pay either the principal or the loan finance charge." Quicken argues that the

legislature could have used similar language in West Virginia Code §46A-2-121, but clearly did not do so.

This Court has consistently adhered to the principles of statutory construction set forth in syllabus points four, five and six of *Community Antenna Serv. Corp. v. Charter Communications, VI, LLC*, 227 W.Va. 595, 712 S.E.2d 504 (2011), in which we stated, respectively, as follows:

> Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments. Syllabus Point 3, *Smith v. State Workmen's Comp. Comm'r.*, 159 W.Va. 108, 219 S.E.2d 361 (1975).
>
> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syllabus Point 5, *State v. Snyder*, 64 W.Va.659, 63 S.E. 385 (1908).
>
> Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly. Syllabus Point 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d

907 (1975).

Furthermore, as we have made clear in prior cases, “[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” *Williamson v. Greene*, 200 W.Va. 421, 426, 490 S.E.2d 23, 28(1997) (emphasis provided) (*quoting Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996)).

Applying these rules of statutory construction, therefore, we must conclude that although the circuit court had the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code §46A-2-121, the clear language of the statute simply does not allow the court to cancel Plaintiff’s debt obligation. Therefore, this Court finds that the court committed error in canceling Plaintiff’s debt obligation under West Virginia Code 46A-2-121.

3. Unfair and Deceptive Acts

Under West Virginia Code §46A-6-104, “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” In the case sub judice, the circuit court found that Quicken engaged in unfair methods of competition and unfair or deceptive acts or practices by misrepresenting to

Plaintiff the extent to which she was buying down her interest rate; by "[n]ot disclosing to [Plaintiff] prior to closing that her loan had an enormous balloon payment and then not properly disclosing the balloon payment at closing;" and by "[c]onducting a negligent appraisal review and approving a loan based on a grossly inflated appraisal." Specifically, the circuit court found that this conduct met the definitions of "unfair methods of competition and unfair or deceptive acts or practices" as set forth in West Virginia Code §46A-6-

102(7)(K)(L)(M) and (N).[34] Quicken did not appeal the circuit court's conclusion that it engaged in unfair methods of competition and unfair or deceptive acts or practices.

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[34]West Virginia Code §46A-6-102(7)(K)(L)(M) and (N) provide:

> (7) "Unfair methods of competition and unfair or deceptive acts or practices" means and includes, but is not limited to, any one or more of the following:
>
> . . . .
>
> (K) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;
>
> (L) Engaging in any conduct which similarly creates a likelihood of confusion or of misunderstanding;
>
> (M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;
>
> (N) Advertising, printing, displaying, publishing, distributing or broadcasting, or causing to be advertised, printed, displayed, published, distributed or broadcast in any manner, any statement or representation with regard to the sale of goods or the extension of consumer credit including the rates, terms or conditions for the sale of such goods or the extension of such credit, which is false, misleading or deceptive or which omits to state material information which is necessary to make the statements therein not false, misleading or deceptive[.]

Under West Virginia Code §46A-6-106(a), a consumer who suffers an "ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may . . . recover actual damages or two hundred dollars, whichever is greater. *The court may, in its discretion, provide such equitable relief as it deems necessary or proper.*" *Id*. in relevant part. (Emphasis added). It is Quicken's contention that cancellation of Plaintiff's debt obligation (i.e., forfeiture of the loan principal) is not an equitable remedy.[35]

The term "forfeiture" is defined, inter alia, as "[t]he loss of a right, a privilege, or property because of a crime, breach of obligation, or neglect of duty." Black's Law Dictionary 661 (7th ed. 1999). In past cases, this Court has not looked favorably on forfeiture as a remedy. Rather, "[i]t is an 'elementary principle of equity jurisprudence that equity looks with disfavor upon forfeitures, and that equity never enforces a penalty or forfeiture if such can be avoided.' *Sun Lumber Co. v. Thompson Land & Coal Co.*, 138 W.Va. 68, 76, 76 S.E.2d 105, 109 (1953)." *Fraley v. Family Dollar Stores of Marlinton, W.Va., Inc.*, 188 W.Va. 35, 38, 422 S.E.2d 512, 515 (1992). As we held in syllabus point one of *Helton v. Reed*, 219 W.Va. 557, 558, 638 S.E.2d 160, 161(2006), "'[e]quity will not enforce a forfeiture.'" (quoting Syllabus, in part, *Craig v. Hukill*, 37 W.Va. 520, 16 S.E.363 (1892)). *See Carder*

[35]Quicken further argues, and Plaintiff does not dispute, that a forfeiture does not constitute "actual damages." Rather, Quicken argues, it is a windfall.

v. Matthey, 127 W.Va. 1, 7, 32 S.E.2d 640, 642 (1944) ("It is familiar law that forfeitures are not favored in courts of equity . . . . not only will a court of equity ordinarily refuse to act affirmatively in the enforcement of a forfeiture, but will often relieve against it.")

Plaintiff has failed to offer any authority tending to support forfeiture of the loan principal as an equitable remedy under the unfair and deceptive acts provisions of the Act, as set forth above. To the contrary, this Court finds that a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible.[38] *See Go Mart, Inc. v. Olson*, 198 W.Va. 559, 563, 482 S.E.2d 176, 180 (1996) (finding that where seller who entered into contract to sell real estate was found to have been incompetent, circuit court properly directed her to return full purchase price, thereby balancing the equities in "terms of returning the parties to the status quo . . . 'as far as possible.'").

D. Punitive Damages

Following the trial on the issue of liability, the circuit court conducted a trial on the issues of attorneys fees and punitive damages. Upon the conclusion thereof, the circuit court awarded attorneys fees and costs in the amount of $495,956.25 and expenses in the

[38]For similar reasons, forfeiture of the loan principal is not a viable remedy under Plaintiff's fraud claim.

amount of $100,243.64, for a total of $596,199.89.[39] With regard to punitive damages,[39] the court stated in its February 17, 2011, order as follows:

> Taking all of the *Garnes* [*v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991)], factors into consideration, including applying a factor of three times the compensatory damages and attorneys fees, [the punitive damages award] is $2,168,868.75.
>
> This Court believes that this amount fairly applies the five standards in *Garnes* including the financial position of the defendant and as a matter of fundamental fairness, assuring that the punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees.

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[39]The circuit court characterized this matter as "one of the more confusing, confounding and complex cases both factually and legally that has ever been before" it. After modifying the proposed hourly rate of Plaintiff's attorneys and their staff, the court determined that the billing records submitted by Plaintiff's counsel were "both reasonable and reliable" under the guidelines set forth in *Aetna Casualty and Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). Quicken does not challenge the amount of attorneys fees awarded in this case.

[39]The parties agree that punitive damages are available in an action for common law fraud. *Muzelak v. King Chevrolet Inc.*, 179 W.Va. 340, 368 S.E.2d 710 (1988). They further agree that "punitive damages are not available under the fraud or unconscionability provisions of W.Va. Code, §46A-2-121 [1974], and §46A-2-102(5) [1974]." *One Valley Bank of Oak Hill v. Bolen*, 188 W.Va. 687, 692, 425 S.E.2d 829, 834 (1992). Whether punitive damages are available under the *remaining* provisions of the Act which are at issue herein is not raised by either party in this appeal. *See e.g., Muzelak*, 179 W.Va. at 344, 368 S.E.2d at 715 (where plaintiff alleged claim of "statutory misrepresentation and unfair or deceptive acts" based upon West Virginia Code §46A-6-102(f)(13) [1974], defendant argued plaintiff was limited to actual damages under the language of West Virginia Code §46A-6-106 and that trial court committed error in giving punitive damages instruction to jury. This Court stated that "we need not decide today whether Mrs. Muzelak may recover punitive damages under W.Va. Code §46A-6-102(f)(13) [1974] because Mrs. Muzelak also pleaded and proved a cause of action for common law misrepresentation or fraud."). We, therefore, will not address the issue in this case.

Quicken argues that the circuit court deprived it of procedural due process by failing to perform the required analysis of punitive damages pursuant to syllabus point three of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), in which this Court held as follows:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

> (5) The financial position of the defendant is relevant.

In syllabus point four of *Garnes,* we also held that

> [w]hen the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

In the case sub judice, the circuit court's conclusory order on punitive damages fails to satisfy the requirements set forth in *Garnes*. Even though this matter was tried before a judge rather than a jury, it was necessary for the circuit court to conduct a meaningful and adequate analysis under *Garnes* so that this Court may, in turn, conduct a meaningful and

adequate review of the award on appeal. *Id.* 186 W.Va. at 667, 413 S.E.2d at 908. As we held in syllabus point five of *Garnes*,

> Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

See Syl. Pt. 5, *Alkire v. First Nat'l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

Because the circuit court's order on punitive damages lacked the necessary analysis and findings required by *Garnes*, this Court is unable to conduct a meaningful and adequate review of the punitive damages award. *See State ex rel. Harper-Adams v. Murray*, 224 W.Va. 86, 680 S.E.2d 101 (2009). Because the circuit court failed to conduct a proper analysis under *Garnes*, such an analysis must be conducted upon remand.

E. Attorneys Fees as Compensatory Damages

Quicken's next assignment of error is that the circuit court committed error by including attorneys fees in its calculation of the punitive damages award. As indicated above, the circuit court took "all of the *Garnes* factors into consideration, including applying a factor of three times the compensatory damages and attorneys fees" and awarded punitive damages

in the amount of $2,168,868.75.[40] It is Quicken's contention that attorneys fees are punitive in nature and not compensatory and thus, may not be included in the ratio of compensatory to punitive damages.

The circuit court awarded Plaintiff attorneys fees and costs pursuant to West Virginia Code §46A-5-104 of the West Virginia Consumer Credit and Protection Act, which provides as follows:

> In any claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice, the court may award all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer. On a finding by the court that a claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice was brought in bad faith and for the purposes of harassment, the court may award to the defendant reasonable attorney fees.

Quicken does not challenge the applicability of this fee-shifting statute to the facts and circumstances of this case.

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[40]*See* Syl. Pt. 6, *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004) (explaining that "'[t]he outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.' Syllabus Point 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *affirmed by* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)").

This Court has recognized the Consumer Credit and Protection Act to be "a remedial statute intended to protect consumers from unfair, illegal and deceptive business practices, [which] must be liberally construed to accomplish that purpose." *Harper v. Jackson Hewitt, Inc.*, 227 W.Va. 142, 151, 706 S.E.2d 63, 72 (2010). *See State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995). Though not specifically articulated in our Act, other jurisdictions have made clear that their consumer protection fee-shifting provisions are compensatory in nature. *See Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000) (stating that Kentucky Consumer Protection Act is "'intended [inter alia] to compensate the prevailing party for the expense of bringing an action under the statute.'" (internal citation omitted)); *Gordan v. Archer*, 1999 WL 788548 *2 (Mass.App.Div. 1999) (finding that attorneys fees awarded under Massachusetts consumer protection fee-shifting statute "are assessed in an amount equal to the reasonable and objective worth of plaintiff counsel's professional time and effort . . . . and are construed as strictly compensatory in nature."); *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 584 (Va. 2003) (stating that purpose of statutory award of attorneys fees and costs under Virginia Consumer Protection Act differs from purposes of punitive damages, the latter of which is designed to punish and deter unlawful conduct, whereas "fee shifting provisions . . . are designed to encourage private enforcement of" statute).

Likewise, the purpose of fee-shifting statutes similar to West Virginia Code §46A-5-104, above, have been considered by this Court to be compensatory in nature. For

example, in *Farley v. Zapata Coal Corp.*, 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981), former employees of a defunct strip mine operator sought to recover from the coal rights' lessee unpaid wages, accrued vacation and sick pay, liquidated damages and attorneys fees and costs. Upon holding that an award of attorneys fees was warranted under the fee-shifting provision of the West Virginia Wage Payment and Collection Act, this Court stated that the statutory provisions at issue

> are designed to protect the laborer and act as an aid in the collection of compensation wrongfully withheld. Working people should not have to resort to lawsuits *to collect wages they have earned*. When, however, resort to such action is necessary, the Legislature has said that *they are entitled to be made whole by the payment of* wages, liquidated damages, and costs, *including attorney fees*. If the laborer were required to pay attorney fees out of an award intended to compensate him for services performed, the policy of these statutes would be frustrated.

Farley, 167 W.Va. at 639, 281 S.E.2d at 244 (emphasis added).

Likewise, in *Orndorff v. West Virginia Dept. of Health*, 165 W.Va. 1, 4, 267 S.E.2d 430, 432 (1980), which involved a plaintiff who was unlawfully denied civil service employment, this Court concluded that the plaintiff was entitled to reasonable attorneys' fees under the applicable fee-shifting statute. In addressing the "scope of the right to obtain" such fees in a civil reinstatement proceeding, we recognized that

> [o]ne obvious purpose of a provision for reasonable attorney fees is to provide a measure of *restitution* to a civil service employee who has been wrongfully discharged or suspended and, as a result, forced to hire an attorney to seek redress. Equally apparent is another goal, to provide an

> inducement to the employee who has been wrongfully discharged to challenge the action since, if successful, *he is relieved of the burden of paying reasonable attorney fees*.

Orndorff, 165 W.Va. at 4-5, 267 S.E.2d at 432 (emphasis added). *See Daily Gazette Co., Inc. v. West Virginia Development Office,* 206 W.Va. 51, 58, 521 S.E.2d 543, 550 (1999) (stating that FOIA's fee-shifting statute, W.Va. Code §29B-1-7, "which is a marked departure from the general rule that each party bears his/her own litigation costs, is intended to *relieve some of the burden associated with the public's pursuit of the right* to access public records and to encourage the cooperation of public officials when requests for such records are made." (Footnote omitted and emphasis added)); syl. pt. 14, *Bettinger v. Bettinger,* 183 W.Va. 528, 396 S.E.2d 709 (1990) (holding that "[t]he purpose of W.Va. Code, 48-2-13(a)(4)(1986), is to enable a spouse who does not have financial resources to obtain *reimbursement for costs and attorney's fees* [incurred] during the course of the litigation." (Emphasis added)).

Furthermore, we are mindful of cases from other jurisdictions in which attorneys fees awarded pursuant to a fee-shifting statute were included as compensatory damages in the ratio of compensatory to punitive damages. In *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005), the insured, Willow Inn, sued its insurer under Pennsylvania's bad faith statute after the insured "encountered sustained resistance to its insurance claim" for property damage resulting from a tornado. 399 F.3d at 227. In the bad faith claim, the insured was awarded $150,000 in punitive damages and attorneys fees and

costs in the amount of $135,400. The United States Court of Appeals for the Third Circuit concluded the attorneys fees and costs awarded under the applicable fee-shifting statute to be "the proper term to compare to the punitive damages award for ratio purposes." *Id.*, at 235. The court reasoned, in part, that the statute's fee-shifting provisions "vindicate the statute's policy by enabling plaintiffs such as Willow Inn to bring . . . actions alleging bad faith delays [and] to secure counsel on a contingency fee." *Id*., at 236. The court thus concluded that attorneys fees and costs awarded pursuant to the applicable fee-shifting statute are compensatory damages for "ratio purposes." *Id.*, at 237.

Similarly, in *Blount v. Stroud*, 915 N.E.2d 925 (Ill.App.Ct.2009), the court recognized "that the amount of attorney fees expended in a case may be taken into account when assessing the propriety of a punitive damage award." 915 N.E.2d at 943. In *Blount*, the plaintiff prevailed in a retaliation claim against her former employer under the United States Civil Rights Act of 1991 and was awarded attorneys fees under the fee-shifting provision of the statute.[41] The court in *Blount* made clear that the fee-shifting provision of the Civil Rights Act, 42 U.S.C. 1988, is remedial in nature and not punitive. Its purpose "is to ensure effective access to the judicial process for persons with civil rights claims and to encourage litigation to enforce the provisions of the Civil Rights Act and the Constitution" *Id.* at 944. Thus, the

[41]In *Blount*, the jury awarded plaintiff compensatory damages in the amount of $282,350, for physical and/or emotional pain and suffering and back pay. She was also awarded in excess of $1,000,000 in attorneys fees and costs under the fee-shifting provision of the Civil Rights Act. The jury awarded her $2.8 million in punitive damages.

court in *Blount* concluded that the attorneys fees awarded under the fee-shifting provision of the Civil Rights Act "should be counted on the compensatory side" of the compensatory to punitive damages ratio. *Id*. at 945. *See Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827, 836 (Wash. 2012) (holding that "recovery of attorney fees is compensatory in that those fees attempt to make [plaintiff] whole for the employer's actions in intentionally failing in its maritime duty to provide maintenance and cure. It was proper for trial court to include attorney fees as part of the compensatory damages award when calculating the punitive damages ratio.")

In light of the foregoing, and considering this Court's past recognition that, in general, fee-shifting statutes are compensatory and not punitive in nature, we find persuasive the argument that the attorneys fees and costs awarded under West Virginia Code §46A-5-104 shall be included in the compensatory to punitive damages ratio[42] where, as here, punitive damages are available to Plaintiff because there was a finding of common law fraud. Accordingly, we hold that attorneys fees and costs awarded under West Virginia Code §46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act shall be included in the compensatory to punitive damages ratio in cases where punitive damages are available.[43]

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[42]Indeed, this is wholly consistent with *Garnes*, which directs that review of a punitive damages award should, at a minimum, consider, among other factors, "[t]he costs of the litigation." *Garnes*, at syl. pt. 4, 186 W.Va. at 659, 413 S.E.2d at 900.

[43]We note Quicken's additional argument that because attorneys fees in this (continued...)

F. Offset

Quicken's final assignment of error is that the circuit court committed error in failing to offset the compensatory damages award against Plaintiff's pre-trial settlement with co-defendants Appraisals Unlimited, Inc. and appraiser Dewey Guida. Quicken represents that Plaintiff settled with these parties for the amount of $700,000 and that, because all of Plaintiff's damages flowed from the inflated appraisal by Mr. Guida and his company, Plaintiff is entitled to an offset as a matter of law.

The circuit court entered the judgment order in this case on February 17, 2011. Quicken filed its motion for offset on April 8, 2011, and the circuit court summarily denied it by order entered May 2, 2011. Although the circuit court offered no explanation for its ruling, Plaintiff argues that Quicken failed to file its motion within ten days of the entry of judgment, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure.

Despite Plaintiff's argument to the contrary, the issue of offset is governed by Rule 60(a) of the West Virginia Rules of Civil Procedure and this Court's decision in *Savage v. Booth*, 196 W.Va. 65, 468 S.E.2d 318 (1996). In *Savage*, during the pendency of a sexual

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[43](...continued)
case were awarded under West Virginia Code §46A-5-104 of the Consumer Credit and Protection Act and because, Quicken maintains, the Act does not allow a punitive damages award, it was not "logical" for the circuit court to consider the attorneys fees award in its calculation of punitive damages. Plaintiff provides this Court with no legal authority in support of this argument. We, therefore, decline to address it.

harassment trial, the plaintiffs settled with one of the defendants for $50,000. The trial against the remaining defendant proceeded to a jury verdict for $40,000. The judgment order "gave no credit nor made any reference to the settlement agreement." 196 W.Va. at 67, 468 S.E.2d at 320. Three months after the entry of judgment, the defendant filed a Rule 60 motion to, inter alia, "give credit for the $50,000 settlement . . . and to enter a new order stating that there is no balance due the plaintiffs from the defendant." *Id.* The trial court ultimately denied the defendant's motion because he failed to timely file it pursuant to Rule 59(e).

On appeal, this Court reiterated that

> Rule 60(a) of the West Virginia Rules of Civil Procedure applies to clerical errors made through oversight or omission which are part of the record and is not intended to adversely affect the rights of the parties or alter the substance of the order, judgment or record beyond what was intended.

Id., at syl. pt. 3, 196 W.Va. at 66, 468 S.E.2d at 319.[44]

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[44]Rule 60(a) of the West Virginia Rules of Civil Procedure provides as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

This Court in *Savage* concluded "as a matter of law that upon the defendant's motion the trial court was required to deduct the settlement amount from the jury verdict prior to entering the final judgment. The trial court's initial failure to give such credit was a mere oversight and does not arise to the level of more substantial errors which must be considered pursuant to Rule 59(e) or Rule 60(b)." *Id.*, 196 W.Va. at 70, 468 S.E.2d at 323.

According to Quicken, Plaintiff suffered a single indivisible loss and, thus, she is entitled to but one complete satisfaction for her injury. *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). *See Pennington v. Bluefield Orthopedics, P.C.*, 187 W.Va. 344, 349, 419 S.E.2d 8, 13 (1992). Plaintiff counters (albeit very superficially) that Quicken fails to meet the "'joint obligation' and/or 'single indivisible injury'" elements under *Zando*.

In syllabus point eight of *Zando*, we held, in relevant part, that

> [w]here there is a single indivisible loss arising from the actions of multiple parties who have contributed to the loss, the fact that different theories of liability have been asserted against them does not...prevent them from obtaining a verdict credit for settlements made with the plaintiff by one or more of those jointly responsible.

182 W.Va. at 600, 390 S.E.2d at 799.

Accordingly, given that Plaintiff does not seriously argue otherwise, it is clear that Plaintiff suffered a single indivisible loss arising from the actions of Quicken and the settling co-defendants. Quicken is therefore entitled to a credit for the settlement between Plaintiff and the appraisal defendants, pursuant to Rule 60(a) and *Savage*.

Finally, we note that the parties are in agreement that any credit for the settlement between Plaintiff and Quicken's co-defendants is not to be applied to any punitive damages which may be awarded upon remand in this case. As we held in syllabus point one of *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996),

> [d]efendants in a civil action against whom awards of compensatory and punitive damages are rendered are entitled to a reduction of the compensatory damage award, but not the punitive damage award, by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties.

IV. Conclusion

For the reasons stated herein, the order of the Circuit Court of Ohio County entered May 2, 2011, is affirmed, in part; reversed, in part; and this matter is remanded for further proceedings consistent with this opinion.

Affirmed, in part; Reversed, in part; and Remanded.

13-0764

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

LOURIE BROWN and
MONIQUE BROWN,
Plaintiffs,

vs. **Civil Action No. 08-C-36**
Judge David J. Sims

QUICKEN LOANS, INC.,
Defendant.

OPINION AND ORDER

This matter comes before this Court upon remand from the West Virginia Supreme Court of Appeals decision in *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640 (W.Va. 2012), which affirmed in part and reversed in part, the Memorandum of Opinion and Order entered by Judge Arthur M. Recht on February 25, 2010, and the Memorandum of Opinion and Order (Attorney Fees/ Punitive Damages) entered by Judge Recht on February 17, 2011, in the above matter and remanded with directions.

I. The *Quicken Loans* Decision

In *Quicken Loans*, the Supreme Court affirmed the Circuit Court's conclusion that the Plaintiffs had proven, by clear and convincing evidence, that Quicken Loans committed fraud in that: 1) Quicken Loans failed to properly disclose to Plaintiffs the amount of the balloon payment due on the loan; and 2) Quicken Loans falsely promised Plaintiffs that it would refinance their loan in three to four months after closing and that Plaintiffs were justified in relying on that promise. *Id.* at 655.

The Supreme Court further found that Quicken Loans misrepresented to Plaintiffs the extent to which they were buying down their interest rate, conduct which the Supreme Court found to be "distasteful and opportunistic." *Id.* at 656. However, the Supreme Court determined that the

Plaintiffs failed to prove, by clear and convincing evidence, that they relied upon the misrepresented discount points when they entered into the loan. In so holding, the Court otherwise affirmed the Circuit Court's rulings that the evidence relating to the concealment of the balloon payment and promise to refinance were acts of fraud and were proven by clear and convincing evidence. *Id.*

On the issue of unconscionability under West Virginia Code §46A-2-121, the Supreme Court affirmed the Circuit Court's finding that, given the particular facts involved in this case, the terms of the loan and the loan product, in and of itself, were unconscionable. *Id.* at 659.

The Supreme Court also addressed the Circuit Court's decision to cancel the Plaintiffs' loan obligation. The Supreme Court found that: 1) because the Circuit Court found Quicken Loans' violation of West Virginia Code §31-17-8(m)(8) to have been "negligent" rather than "willful", the Circuit Court committed error in canceling Plaintiffs' mortgage obligation under that particular statute. *Id.* at 660; 2) the Circuit Court had the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code §46A-2-121, but the clear language of the statute did not allow the Circuit Court to cancel Plaintiffs' debt obligation and, therefore, the Circuit Court erred in canceling Plaintiffs' debt obligation under said statute. *Id.* at 661; 3) Plaintiffs failed to offer any legal authority supporting forfeiture of the loan principal as an equitable remedy under the unfair and deceptive acts under West Virginia Code §46A-6-104, and that a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible. *Id.* at 662.

The Supreme Court remanded this matter on the issue of punitive damages stating:

> "Because the circuit court's order on punitive damages lacked the necessary analysis and findings required by *Garnes*, this Court is unable to conduct a meaningful and adequate review of the punitive damages award. *See State ex rel. Harper-Adams v. Murray*, 224 W.Va. 86, 680 S.E.2d 101 (2009). Because the circuit court failed to conduct a proper analysis under *Garnes*, such an analysis must be conducted upon remand." *Id.* at 664.

While Quicken Loans did not challenge on appeal the amount of attorney fees and costs awarded in this matter[1], it did appeal the Circuit Court's decision to include attorneys fees and costs in its calculation of the compensatory damages to punitive damages award ratio. The Supreme Court rejected said challenge holding that, in general, fee-shifting statutes are compensatory and not punitive "in nature", and attorneys fees and costs awarded under West Virginia Code §46A-5-104 shall be included in the compensatory to punitive damages ratio, in cases such as this one, where punitive damages are available due to the Circuit Court's finding of common law fraud. *Id.* at 666.

Finally, the Supreme Court held that Quicken Loans is entitled to a credit for the settlement between Plaintiffs and the appraisal Defendants, but that any credit for the settlement between Plaintiff and Quicken Loans' co-Defendants is not to be applied to any punitive damages which may be awarded upon remand in this case. *Id.* at 668.

II. Issues Presented on Remand

The parties generally agree that there are three (3) issues for this Court to address on remand:

1) The remedy for the finding that the loan terms and loan product were unconscionable;

2) Apply the standards set for in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), to determine whether a punitive damage award is warranted by the facts of this case, and, if so, the appropriate amount of a punitive damage award;

3) The appropriate amount of the offset against any award of compensatory damages.

In addition, this Court will address a 4th issue of whether additional attorney fees and costs should be awarded to the Plaintiffs for attorney fees and costs incurred subsequent to the entry of the final Memorandum of Opinion and Order (Attorney Fees/ Punitive Damages) entered by Judge Recht on February 17, 2011.

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[1] See footnote 37 of *Quicken Loans*.

III. Discussion[2]

A. Remedy for the Unconscionable Loan[3]

In *Quicken Loans*, the Supreme Court, having already found that Quicken Loans "acted fraudulently in inducing Plaintiff[s] into entering into the loan", concluded that "there is no merit to Quicken's contention that it did not violate West Virginia Code §46A-2-121 in this regard." *Quicken Loans* at 658. The Supreme Court held that "the circuit court correctly found that, given the particular facts involved in this case, the terms of the loan described above and the loan product, in and of itself, were unconscionable" pursuant to under West Virginia Code §46A-2-121. *Id.* at 659.

However, the Supreme Court reversed the Circuit Court's decision to cancel Plaintiffs' debt obligation under West Virginia Code 46A-2-121 finding that:

> "(A)lthough the circuit court had the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code §46A-2-121, the clear language of the statute simply does not allow the court to cancel Plaintiff's debt obligation." *Id.* at 661.

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[2] This matter was tried as a bench trial before Judge Recht beginning October 5, 2009, lasting 6 days, and concluding on October 12, 2009. In addition, on December 1, 2009, Judge Recht heard arguments on the Proposed Findings of Fact and Conclusions of Law submitted by the parties subsequent to the bench trial. This Court, as directed by the Supreme Court, obtained from counsel for the parties, copies of the complete transcripts of the trial and the December 1, 2009 hearing, along with the exhibits admitted into evidence at the trial. This Court has read the relevant trial transcripts and admitted exhibits. As directed by the Supreme Court, this Court is making an independent determination as to whether punitive damages were warranted by the evidence presented at the trial of this matter, and, if warranted, the amount of punitive damages. This Court is not bound by Judge Recht's prior rulings on these issues.

[3] It is not necessary for this Court to make specific findings of fact on this issue for the reason that the findings of fact previously made by the circuit court have been affirmed on appeal, but remanded due to the circuit court's error in ordering that the debt obligation be canceled as a remedy under W. Va. Code §46A-2-121.

West Virginia Code §46A-2-121 states, in relevant part, that:

> "(1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:
>
> (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or
>
> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result."

This Court must now fashion a proper and lawful remedy to address the conclusive findings that the loan terms and the loan product in question were unconscionable and in violation of West Virginia law.

The Plaintiffs assert that they are still entitled to some equitable remedy in light of their proving fraud and that the loan was unconscionable by clear and convincing evidence. Plaintiffs urge this Court to reform the Note and Deed of Trust to provide for no interest or fees of any kind and further reform the loan to amortize fully over 40 years leaving no balloon payment. This Court rejects this approach for the reason that West Virginia Code §46A-2-121 does not provide clear authorization to this Court to reform the Note and Deed of Trust or any clear guidance as to how such reformation should be accomplished.

Quicken Loans asserts that the most appropriate remedy is to simply restore the parties to their original positions in this matter and to erase the transaction altogether. Quicken Loans urges this Court to order the Plaintiffs to use their recovery in this matter to rid themselves of the Note obligation. The Court also rejects this approach for the reason that Quicken Loans has conclusively engaged in unlawful and egregious conduct in the matter and the Plaintiffs are entitled to some form of meaningful relief other than the status quo.

Having rejected both the Plaintiffs' and Quicken Loans' proposed remedies, this Court adopts a portion of the ruling of the Supreme Court in *Quicken Loans* holding that this Court has the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code §46A-2-121(1)(a). *Id.* at 661. The Plaintiffs shall have no further legal obligation to repay to Quicken Loans the Note executed by the Plaintiffs, and Quicken Loans shall have no further legal rights under the terms of said Note and Deed of Trust. The Deed of Trust executed by the Plaintiffs shall remain a valid lien on the Plaintiffs' real property. In the event of the sale of Plaintiffs' real property by Plaintiffs, or their heirs, successors or assigns, said sale must be a valid, open market, arms-length transaction with the selling price being at or near fair market value at the time of the sale. At the time of the closing of the sale, Quicken Loans will be entitled to receive all of the net proceeds[4] from the sale up to the principal amount of the loan made to Plaintiffs ($144,800.00). At said closing, and upon receipt of the net proceeds, Quicken Loans shall deliver to Plaintiffs, or their heirs, successors or assigns, a full and final release of the said Deed of Trust and shall discharge the said Note as fully paid and satisfied.

<u>B. Punitive Damages</u>

In *Quicken Loans*, the Supreme Court held that "the circuit court's order on punitive damages lacked the necessary analysis and findings required by *Garnes*"; therefore the Court could not conduct "a meaningful and adequate review of the punitive damages award." The Supreme Court directed that such an analysis must be conducted upon remand.

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[4] Net proceeds means the amount Plaintiffs, their heirs, successors or assigns would otherwise receive after all standard closing costs and adjustments, including but not limited to, all taxes, assessments, expenses, fees, costs, commissions, etc., are deducted at closing from the sales price. In other words, the bottom line on sellers' side of page 1 of the HUD-1 settlement statement.

In syllabus point three of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), the Court held as follows:

> "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant."

In syllabus point four of *Garnes*, the Court also held that:

> "[w]hen the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury."

1. *Garnes* Syllabus Point 3 analysis

a. Reasonable Relationship to Likely or Actual Harm

It is uncontroverted that Quicken Loans committed fraud and engaged in unconscionable conduct in this matter. The mere terms of the loan made to the Plaintiffs boggles the mind. The original loan amount was $144,800.00, on a home with a legitimate appraised value of $46,000.00, less than one-third (⅓) of the loan amount. The loan was a 30 year loan, amortized over 40 years, with monthly payments ranging from $1,144.00 to $1,582.00. The total amount of the required 360 monthly principal and interest payments was approximately $550,084.00. Shockingly, after paying over half a million dollars over 30 years, the Plaintiffs were still obligated to make a balloon payment of $107,015.00. The Plaintiffs' payment of $550,084.00 would reduce their principal due by only $37,785.00.

It is nearly impossible to calculate the total cost of the loan because, after 30 years of payments, it is highly unlikely that the Plaintiffs would have $107,015.00 readily available to them to make the balloon payment. Therefore, they would be required to refinance to make the balloon payment and possibly procure a similar loan with the same unfavorable terms. The finance charge over the life of the original loan totals $520,065.61. To call this conduct unconscionable is to minimize the egregious and despicable nature of it. It is boarderline criminal.

The nature of the likely financial harm here is enormous, and the fact that it falls upon low income individuals is heartbreaking and must be condemned. Judge Recht summarized it best in his

Memorandum of Opinion and Order, when he concluded that the "loan converted $25,000 in unsecured debt to secured debt and raised [Plaintiffs'] secured monthly debt obligation from $578 to $1,114; thus, putting the Plaintiffs' home at risk." P. 18, ¶ 45.

After much prodding from Quicken Loans, the Plaintiffs completed the loan, which was, nearly from the outset, unmanageable. The fact that the loan far exceeded the legitimate fair market value of the home, left the Plaintiffs unable to refinance the loan or sell the home. Their only likely future option was foreclosure and the loss of their home. Their only recourse to save their home was litigation.

The likely and actual harm in this case goes beyond financial harm. The fear and stress of being unable to manage a mortgage loan and the looming threat of losing one's home, can only cause incalculable psychological harm and mental distress. The Plaintiffs described in detail the toll this took on them emotionally.

One does not need to be reminded of the significant adverse impact the financial crises of 2008 had on the global economy. "Sub-prime" loans and high-risk loans played a major role in triggering the crises. The economic damage was far-reaching and the effects are still felt everywhere nearly five (5) years later.

b. Reprehensibility of Quicken Loans' Conduct

As has been stated above, Quicken Loans' conduct in this matter is reprehensible at best. The findings and conclusions that Quicken Loans engaged in fraudulent and unconscionable conduct were definitively affirmed on appeal. There is a recklessness and inherent greed in Quicken Loans' conduct. Quicken Loans has shown no concern for any of the consequences of its' conduct. Quicken Loans' only motive in procuring Plaintiffs' mortgage loan was to turn an immediate profit

and then quickly unload what it had to know would eventually be a non-performing loan, to some other entity.

Quicken Loans knew or should have known that the conduct that it was engaged in was illegal. According to the HUD-1 Settlement Statement,[5] (Trial Exhibit 1-L) the loan closing was conducted at the Plaintiffs' home on July 7, 2006, by an individual from a company called Lender's Services Inc., (hereinafter referred to as "LSI"). It is clear from the testimony in this matter that LSI was retained by Quicken Loans to perform a "title abstract", issue title insurance,[6] and to conduct the loan closing. The individual who conducted the closing, a notary public named Michael S. Miller,[7] was either an employee of LSI or an independent contractor hired by LSI. It is equally clear that no attorney or any other individual knowledgeable about the content of the 81 pages of loan closing documents was present at the 15-minute closing. In fact, there is no evidence in the record that an attorney was ever involved in the loan closing process from the beginning.[8]

Quicken Loans required the Plaintiffs to purchase a lender's policy of title insurance, insuring the amount of the loan ($144,800.00) at Plaintiffs' sole cost of $357.74.[9] This policy insured

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[5] The HUD-1 Settlement Statement was approved on behalf of Quicken Loans by Michael Lyon, Vice President of Mortgage Operations.

[6] LSI was apparently a title insurance agent for Chicago Title.

[7] It should noted that Mr. Miller incorrectly notarized certain loan closing documents by indicting the documents were signed in Brooke County. It is uncontroverted that the documents were signed at the Plaintiffs' home in Ohio County.

[8] The practice of sending a notary public with no legal training and under no legal supervision to simply "witness" signatures on 81 pages of legal documents at a closing, is poor at best. It may not constitute the unlawful practice of law or violate statutes, but it is an obvious disservice to mortgage loan consumers, particularly when the notary can not even properly notarize the documents. For a closing fee of $525, the Plaintiffs' deserved far better.

[9]The "Title Commitment Summary" issued by LSI lists the lender as "Title Source", a subsidiary of Quicken Loans, and lists the assessed value of the real property at $20,640.00. (Trial Exhibit 1-BB.)

Quicken Loans against any title defects and was mainly to the benefit of Quicken Loans. According to the HUD-1, the title insurance policy was to be issued by LSI. LSI charged $260.00 for an "Abstract or title search" fee, which was actually for the work performed by a non-lawyer.[10] This is illegal and in violation of West Virginia statute.

W.Va. Code §33-11A-11 (c) states as follows:

> "No title insurance shall be issued until the title insurance company has obtained a title opinion of an attorney licensed to practice law in West Virginia, which attorney is not an employee, agent, or owner of the insured bank or its affiliates. Said attorney shall have conducted or cause to have conducted under the attorney's direct supervision a reasonable examination of the title. In no event shall the authority of a state-chartered bank to sell title insurance exceed the authority of a nationally chartered bank to do so."

There is no evidence in the record that either Quicken Loans or LSI obtained a title opinion of an attorney licensed to practice law in West Virginia prior to issuing or obtaining the title insurance policy[11] for the Plaintiffs as is required by W.Va. Code §33-11A-11 (c). Neither actually performed, or caused to be performed, a title examination that is legal or recognized under West Virginia law. Yet, the Plaintiffs were charged for such legal services.

Quicken Loans is a large corporation sophisticated in matters pertaining to real estate and mortgage loans. Quicken Loans does business in West Virginia and is clearly familiar with the laws of this State with regard to mortgage loans and loan closings. It is unfathomable and disturbing that Quicken Loans would willfully fail to comply with West Virginia law in the closing of Plaintiffs'

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[10] According to the HUD-1, LSI charged Plainitffs $250.00 for an "Addl Endorsement Fee." Although it is unclear what this fee is for, it amount of the charge is exorbitant. LSI also charged $525.00 as a closing fee for a 15-minute closing by a notary public, which fee is also exorbitant.

[11] This Court could find no evidence in the record that either a title insurance commitment or title insurance policy was ever issued by LSI for the Plaintiffs' mortgage loan.

mortgage loan and/or recklessly retain a third party closing agent engaged in the same illegal conduct.

Quicken Loans' "chase and dump" style of making mortgage loans clearly demonstrates a business model that the Supreme Court succinctly classified as "distasteful" and "opportunistic." Quicken Loans's own business policies openly encouraged its employees to engage in this type of conduct. Perhaps the most glaring example of this conduct is Quicken Loans's policy of encouraging its loan agents to charge surplus "discount points" to borrowers without providing a reduction in the interest rate. Quicken Loans is not only aware of its employees engaging in this "distasteful" conduct, but it provides financial incentives for them to do so.

Throughout this litigation, Quicken Loans has refused to concede that it has engaged in any improper or illegal conduct despite overwhelming evidence to the contrary. Quicken Loans continues, post-appeal, its' attempts to minimize its culpability in this matter. In Quicken Loans' Opening Brief on Remand, Quicken Loans claims that one of the Plaintiffs (Mrs. Jefferson) supplied the appraised value on her property of $250,000.00. Quicken Loans holds fast to it's contention that the promise to refinance the Plaintiffs' mortgage loan was unsupported by any evidence other than Mrs. Jefferson's own testimony. Quicken Loans also continues to fault Mrs. Jefferson for failing to read the 81 pages of loan closing documents. Finally, Quicken Loans blames the settling co-Defendants stating "the gravamen of [Mrs. Jefferson's] complaint against those settling codefendants (*sic*) was that, but for *their* malfeasance, she would not have incurred the obligation to Quicken Loans in the first place." (Emphasis supplied.)

Quicken Loans proceeds to argue against ***any*** punitive damage award in this matter stating that "[I]n short, this case presents - at worst - a single instance of a mistaken promise by one employee, and a disclosure that was not precise enough until after closing" and that "[A]ny

substantial award is therefore disproportionate to the actual misconduct in this case and to the statutory penalties for such misconduct." Nonsense.[12]

Quicken Loans further argues that its' conduct in this matter "measures low on the reprehensibility scale: it reflected isolated, one-time wrongdoing by lower-level employees, not repeated activity or company-wide policy." It blames the failure to disclose the balloon payment on a flawed closing process. Quicken Loans contends that the Plaintiffs failed to execute the Truth-in-Lending Statement at the closing and that said failure was partially the fault of a "great deal of inattention from Plaintiffs." Quicken Loans fails to acknowledge that the flawed closing process was the result of its' own failure to ever involve an attorney in this mortgage loan transaction. Instead, with reckless indifference, Quicken Loans hired LSI to perform an "abstract or title search" and to issue title insurance in direct violation of West Virginia statute. Quicken Loans also did not care that a notary public, without any legal training or under any legal supervision, conducted a 15-minute "witness only" closing, with 81 pages of legal documents, some improperly notarized, and declined to answer any of the Plaintiffs' questions about the said loan closing documents.

The *coup de grace* of Quicken Loans's argument is the bald assertion that its' litigation costs have been "extensive, and they now include the cost of the appeal, ***which was in substantial part successful***." (Emphasis added.) The temerity of Quicken Loans in making this assertion renders this Court nearly speechless. The only conclusion that can be reached is that Quicken Loans just does not get it and that Quicken Loans refuses to accept responsibility for its' actions. There is no

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[12] It is unimaginable that the Plaintiffs' mortgage loan and closing process was the only one of its type in West Virginia and that Quicken and LSI did not engage in the same unlawful conduct in other loans made in the State. It is fortuitous for LSI that it is not a party to this litigation. Both Quicken and LSI are fortunate that this is not a class action litigation.

accountability on the part of Quicken Loans, which is likely the reason this matter has reached this stage.[13]

c. Quicken Loans's Profit from Wrongful Conduct

As is discussed above, the total potential finance charge on the Plaintiffs' mortgage loan was $520,065.00. This is an enormous potential profit, which Quicken Loans could have reaped had the Plaintiffs not instituted this litigation. While Quicken Loans never realized said profit, its' efforts to sell the loan on the secondary market clearly demonstrates Quicken Loans' intention to profit from a mortgage loan that has been conclusively found to be unconscionable and fraudulent.

Further, Quicken Loans received from the Plaintiffs payments for fees and costs totaling $17,476.72, which amount Judge Recht ordered returned to the Plaintiffs. *Garnes* directs that punitive damages should remove Quicken Loans' profit from its' wrongful conduct and should be in excess of the profit, so that the award discourages future bad acts by Quicken Loans.

d. Reasonable Relationship to Compensatory Damages

Aside from constitutional arguments against an award of punitive damages in this matter, Quicken Loans' main argument is that the proper ratio of punitive damages to compensatory damages in this case should be no greater than 1 to 1. Quicken Loans' Brief's on Remand does not address specific West Virginia cases expressly permitting higher ratios. Plaintiffs argue that this Court is well justified in utilizing a ratio as high as 9-1 in its consideration and review of any punitive damage award in this matter.

[13] Quicken Loans' posture on remand reminds the Court of the tale of Shoichi Yokoi, a Japanese sergeant in the Imperial Japanese Army during World War II, who was among the last Japanese holdouts to be found after the end of hostilities in 1945, discovered in the jungles of Guam in January 1972, almost 28 years after US forces had regained control of the island.

In Syl. pt. 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992) the Court held:

> "The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional."

In *TXO*, the Court essentially set forth two distinct standards of conduct with regard to the analysis of the ratio of punitive damages to compensatory damages. The first concerns a defendant who has engaged in conduct that can be classified as "extreme negligence or wanton disregard but with no actual intention to cause harm." The second concerns a defendant who "has acted with actual evil intention."

In this matter, there is insufficient evidence to find that Quicken Loans has acted with actual evil intention. Therefore, in performing a "ratio" analysis, this Court concludes that Quicken Loans should be judged by the former standard of conduct.

Quicken Loans' conduct in this case has been conclusively found to be fraudulent and unconscionable and is analogous to the standard of extreme negligence or wanton disregard but with no actual intention to cause harm. Therefore, this Court concludes that it should be guided by the ratio set forth in *TXO* of an outer limit of roughly 5 to 1.[14]

e. <u>The Financial Position of Quicken Loans</u>

Quicken Loans objects "on both logical and federal constitutional grounds" to this Court considering the financial position of Quicken Loans "to the extent that this might be interpreted as allowing punitive damages to be increased based on the defendant's wealth." Quicken Loans argues

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[14] Neither of Quicken Loans' two (2) Briefs on Remand address the *TXO* decision in the context of the ratio of punitive damages to compensatory damages.

that its' financial position should not be considered "an aggravating factor." This Court agrees with Quicken Loans' position on this issue. The law is clear that the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

This Court will consider Quicken Loans' financial position solely for the purpose of whether Quicken Loans has the ability to pay a fair and reasonable punitive damage award within the confines of *Garnes* and *TXO*. This Court does not intend to "enhance" the punitive damages award.

In addressing this factor, the Court will consider only Quicken Loans' net worth (subtracting total liabilities from total assets) to determine its "financial position." Quicken Loans' website claims that it is the nation's largest online retail mortgage lender and the third largest overall retail home lender in the United States with $70 Billion in home loan volume in 2012.[15]

Plaintiffs have provided the Court with a summary of Quicken Loans' financial statements that have been admitted into evidence as Plaintiffs' Exhibit #57 and have been ordered sealed. The following paragraph of this Order will be redacted from the original Order filed with the clerk.

2. Garnes Syllabus Point 4 analysis

a. The costs of the litigation

The total cost of this litigation to the Plaintiffs is set forth below and is substantial. Included in these costs are out-of-pocket expenses in excess of $100,000, which were advanced by Plaintiffs' counsel. It is obvious that Plaintiffs could not have afforded to pursue this matter if they were

[15] www.quickenloans.com

required to pay the hourly fees of counsel or to advance litigation costs out of their own pockets. The Court agrees with Plaintiffs' argument that few attorneys would have been willing to pursue this matter given the complexity, time commitment, and significant financial and other resources necessary to bring this matter to a full conclusion. This matter was, and continues to be, aggressively defended by Quicken Loans utilizing highly competent, intelligent and skilled counsel.

b. Any criminal sanctions imposed on Quicken Loans for its' conduct

The parties agree that Quicken Loans has not been charged with, or suffered, any criminal sanctions as a result of its conduct in this matter. Accordingly, this mitigating factor is irrelevant.

c. Other civil actions against Quicken Loans based on the same conduct

The parties agree that Quicken Loans has not had other civil actions against it based on the same conduct. Accordingly, this mitigating factor is irrelevant.

d. The appropriateness of punitive damages to encourage settlement

Quicken Loans argues that this Court must not make a punitive damage award that goes beyond that which is necessary to encourage "fair and reasonable" settlements where a "clear wrong" has been committed. Quicken Loans argues that the complexity of this case mitigates against a punitive damage award. Quicken Loans does concede that much of the Plaintiffs' case was "eventually successful", but stubbornly argues that their case "consisted of self-serving testimony and conjecture." Quicken Loans digs deeper claiming that its' "decision to take the case to trial and appeal *vindicated* its good-faith positions on a number of important factual and legal issues." (Emphasis supplied.) Quicken Loans finally argues that a punitive damage award will set an example for others "not... contemplated by this *Garnes-Perrine* factor." *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010).

Quicken Loans essentially argues that this was a complex case, that the Plaintiffs' evidence was weak, and that Quicken Loans was, for the most part, right in this matter and that, therefore, a punitive damages award against it is not warranted. This Court disagrees. Based upon Judge Recht's rulings and the subsequent decision in *Quicken Loans*, it is apparent that Quicken Loans did not accurately evaluate the egregiousness of it's conduct, it's potential liability, and the potential for a large damages award against it.

Quicken Loans has had, and continues to have, an opportunity to resolve this matter by way of settlement. There is no evidence before this Court that it has ever shown any interest in settling this matter with the Plaintiffs. Quicken Loans instead, as it is clearly entitled to do, chooses to do battle, to hold fast to its' position that it has done little or no wrong in this action, and has caused minimal damage. Quicken Loans chose to fully litigate this matter at trial and on appeal, and now chooses to fight on, post-appeal, as is it's right. However, it can not now complain that it was somehow "vindicated" and, therefore, should not be subject to a punitive damage award. Quicken Loans proceeded in this matter, at its own peril, when others reached compromises, with full knowledge of the consequences should it not prevail. Quicken Loans did not prevail and must now face the music.

This Court concludes that under the full *Garnes* analysis, as directed by the Supreme Court in *Quicken Loans*, a punitive damages award is just, proper and fundamentally fair based upon the all of the facts and evidence in this matter.

3) Offset

The Supreme Court in *Quicken Loans* ordered that Quicken Loans is entitled to full credit against any award of compensatory damages for the sums already paid to Plaintiffs by settling co-

Defendants. *Quicken Loans* at 668. The Supreme Court did not direct this Court as to how said offset was to be made.

Plaintiffs contend that Quicken Loans did not raise the issue of whether it was entitled to an offset for attorney fees and costs awarded in this matter and that, therefore, Quicken Loans has waived the issue. Plaintiffs also assert that their fees and costs can be properly apportioned between the claims against Quicken Loans and the claims against the settling co-Defendants. The Plaintiffs urge this Court to limit Quicken Loans's offset to the restitution award of $17,476.72, and to the $98,800.00 that the Court should now award under §31-17-17(c) in lieu of loan cancellation.

The issues before this Court are: 1) whether a non-settling defendant is entitled to offset an award of attorney fees and costs under the West Virginia Consumer Credit and Protection Act, §46A-1-101 *et seq.*, (hereinafter referred to as "WVCCPA"), a fee-shifting statute, where the defendant has conclusively engaged in fraud and unconscionable conduct; and 2) whether an award of attorney fees and costs is "compensatory in nature" only for the purposes of considering the ratio of punitive damages to compensatory damages, or is fully compensatory damages subject to an offset for a prior settlement. These are issues of first impression in West Virginia.

The Supreme Court in *Quicken Loans* clearly recognized that an award of attorney fees and costs under fee-shifting provisions, such as the WVCCPA, are "compensatory in nature." The Supreme Court cited a string of cases from other jurisdictions interpreting fee-shifting statutes and affirming similar holdings. The public policy behind such fee-shifting provisions is to encourage private enforcement of statutes and to ensure effective access to the legal system.

In *Quicken Loans*, the Court cited *Farley v. Zapata Coal Corp.*, 167 W.Va. 630, 639, 281 S.E.2d 238, 244 (1981), for the proposition that fee-shifting statutes, such as WVCCPA, have been

considered by the Court to be "compensatory in nature." See also, *Orndorff v. West Virginia Dept. of Health*, 165 W.Va. 1, 267 S.E.2d 430, 432 (1980).

The Supreme Court also noted that cases from other jurisdictions permitted attorney fees and costs awarded pursuant to a fee-shifting statute to be included as compensatory damages when considering the ratio of punitive damages to compensatory damages. Many of those cases affirmed the public policy behind fee-shifting provisions in statutes to enable plaintiffs to pursue legal actions where statutes have been violated and to ensure effective access to the legal system.

In *Quicken Loans*, the Supreme Court held that:

> "[I]n light of the foregoing, and considering this Court's past recognition that, in general, fee-shifting statutes are compensatory and not punitive in nature, we find persuasive the argument that the attorneys fees and costs awarded under West Virginia Code §46A-5-104 shall be included in the compensatory to punitive damages ratio where, as here, punitive damages are available to Plaintiff because there was a finding of common law fraud. Accordingly, we hold that attorneys fees and costs awarded under West Virginia Code §46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act shall be included in the compensatory to punitive damages ratio in cases where punitive damages are available." *Quicken Loans* at 666-667.

While the Supreme Court held that attorney fees and costs are "compensatory in nature" and shall be used in considering the punitive damages to compensatory damages ratio in this matter, the Supreme Court did not address the issue of whether an award of attorney fees and costs under a fee-shifting statute, such as the WVCCPA, were fully compensatory damages subject to an offset for a prior settlement.

In *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884 (C.A.2 (Conn.), 1988), the Court considered the issue of whether a non-settling defendant is entitled to offset an attorney fees award by the amount already paid by settling defendants. The *Auwood* Court held:

> "We have considerable doubt as to the availability of such relief, since the statutory provision for an award of attorneys' fees is designed to protect a damage award from the inroads such fees would otherwise make, see, e.g., *International Travel Arrangers, Inc. v. Western*

Airlines, Inc., 623 F.2d 1255, 1274 (8th Cir.), cert. denied, 449 U.S. 1063, 101 S.Ct. 787, 66 L.Ed.2d 605 (1980), and granting such an offset would penalize the pursuit of valid legal claims by a plaintiff who could establish that the nonsettling defendants were liable to it but could not sufficiently prove a high amount of damages." 850 F.2d at 894.

This Court concludes that where attorney fees and costs are awarded for fraud and unconscionable conduct in violation of the WVCCPA, a prior settlement should **not** impact the Plaintiffs' ability to recover said attorney fees and costs. To permit so would be contrary to the clearly stated legislative and public policy of enabling Plaintiffs to pursue legal actions were statutes have been violated and of ensuring effective access to the legal system and would have a chilling effect on said policy.

4. Additional Attorney Fees and Costs Award

Quicken Loans did not challenge on appeal the amount of attorney fees and costs awarded in this matter. An award of additional attorney fees and costs on remand is discretionary. However, given that the Plaintiffs have substantially prevailed on appeal, particularly on the issues of fraud and unconscionability, the Court concludes that an award of additional attorney fees and costs is wholly fair and justified. This Court will utilize the same standards applied by Judge Recht in his Memorandum of Opinion and Order (Attorney Fees/ Punitive Damages) entered February 17, 2011, in awarding additional attorney fees and costs in this matter.

The Plaintiffs' Motion for Attorney Fees and Costs from February 17, 2011, to present, is again reviewed within the context of *Aetna Casualty and Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Syllabus point 4 of *Pitrolo* provides:

> "Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or

contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

This Court, following Judge Recht's prior Order, accepts the billing records submitted by the Law Firm of Bordas and Bordas as being both reasonable and reliable in terms of the work performed and the time devoted to each of those tasks. This Court awards the hourly rates requested by the Plaintiffs, with slight modification, as follows:

1) James G. Bordas, Jr. - Four Hundred Fifty Dollars ($450.00);
2) Jason E. Causey - Three Hundred Dollars ($300.00);
3) James G. Bordas, III - Four Hundred Dollars ($400.00);
4) James B. Stoneking - Three Hundred Dollars ($300.00);
5) Scott S. Blass - Four Hundred Dollars ($400.00);
6) Geoff Brown - Four Hundred Dollars ($400.00);
7) Michelle Marinacci - Three Hundred Dollars ($300.00);
8) Christopher J. Regan - Four Hundred Dollars ($400.00);
9) Samantha Winter - Two Hundred and Fifty Dollars ($250.00);

At the above permitted rates, the award for additional attorney fees and costs are as follows:

1) James G. Bordas, Jr.	$ 59,850.00
2) Jason E. Causey	$142,050.00
3) James G. Bordas, III	$ 4,600.00
4) James B. Stoneking	$ 42,000.00
5) Scott S. Blass	$ 1,400.00
6) Geoff Brown	$ 1,200.00
7) Michelle Marinacci	$ 10,575.00
8) Christopher J. Regan	$ 12,800.00
9) Samantha Winter	$ 1,500.00
Lodestar Total	$275,975.00
Costs	$ 3,058.55
Total Award	**$279,033.55**

Added to the prior attorney fees and costs award, the total award is as follows:

February 17, 2011 award of attorney fees:	$495,956.25
February 17, 2011 award of costs:	$100,243.64
Additional award of attorney fees:	$275,975.00
Additional award of costs:	$ 3,058.55
Total Attorney Fees and Costs Award	**$875,233.44**

It is accordingly

ORDERED that the Plaintiffs shall have no further legal obligation to repay to Quicken Loans the Note executed by the Plaintiffs, and Quicken Loans shall have no further legal rights under the terms of said Note and Deed of Trust. It is further

ORDERED that the Deed of Trust executed by the Plaintiffs shall remain a valid lien on the Plaintiffs' real property and that in the event of the sale of the Plaintiffs' real property by Plaintiffs, or their heirs, successors or assigns, said sale must be a valid, open market, arms-length transaction with the selling price being at or near fair market value at the time of the sale. It is further

ORDERED that at the time of the closing of the sale, Quicken Loans will be entitled to receive all of the net proceeds from the said sale up to the principal amount of the loan made to Plaintiffs ($144,800.00) and that, at said closing, and upon receipt of the net proceeds, Quicken Loans shall deliver to Plaintiffs, or their heirs, successors or assigns, a full and final release of the said Deed of Trust and shall discharge the said Note as fully paid and satisfied. It is further

ORDERED that for all of the foregoing reasons, a punitive damage award is supported by the facts and evidence presented in this matter pursuant to the factors set forth in Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S. E. 2d 897 (1991). It is further

ORDERED that the Plaintiffs are granted a judgment for punitive damages against Quicken Loans in the amount of Three Million Five Hundred Thousand Dollars ($3,500,000.00) and finds that this amount fully applies the *Garnes* and *TXO* standards, is fundamentally fair, and bears a reasonable relationship to the compensatory damages in this matter.[16] It is further

ORDERED that the attorney fees and costs awarded in this matter result from Quicken Loans' fraudulent and unconscionable conduct in violation of the WVCCPA, and, therefore, Quicken

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[16] The punitive damages award is approximately three and one-half (3½) times the amount of compensatory damages awarded in this matter.

Loans is **not** entitled to an offset for the amount of attorney fees and costs awarded in this matter. It is further

ORDERED that the Plaintiffs are granted a judgment for compensatory damages in the amount of $116,276.72, being the total of the restitution award previously made in the amount of $17,476.72, and being the difference between the original loan amount ($144,800.00) and the legitimate appraised value of the home ($46,000.00) in the amount of $98,800.00. It is further

ORDERED that Quicken Loans is entitled to full credit against the award of compensatory damages in the amount of $116,276.72, for the sums already paid to Plaintiffs by settling co-Defendants. It is further

ORDERED that the Plaintiffs are awarded a judgment for attorney fees and costs against Quicken Loans in the amount of Eight Hundred Seventy-Five Thousand Two Hundred Thirty-Three Dollars and Forty-Four Cents ($875,233.44). Interest shall accrue on the initial attorney fees and costs award of Five Hundred Ninety-Six Thousand One Hundred Ninety-Nine Dollars and Eighty-Nine Cents ($596,199.89), at the legal rate, from February 17, 2011, until paid. Interest shall accrue on the additional attorney fees and costs award of Two Hundred Seventy-Nine Thousand Thirty-Three Dollars and Fifty-Five Cents ($279,033.55), at the legal rate, from the date of the entry of this Order until paid. It is further

ORDERED that the Clerk of the Circuit Court of Ohio County shall provide an attested copy of this Order to Counsel of Record for each of the Parties.

To which rulings, the respective objections of the parties are hereby noted.

ENTER this 17th day of June, 2013.

David J. Sims

DAVID J. SIMS, JUDGE

A copy, Teste:

Brenda L. Miller

Circuit Clerk

FILED
OCT 21 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0764

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and **MONIQUE BROWN,**

Plaintiffs below,

Respondents

(From the Circuit Court of Ohio County, No. 08-C-36)

BRIEF OF PETITIONER QUICKEN LOANS, INC.

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ASSIGNMENTS OF ERROR

1. The Circuit Court's $3.5 million award of punitive damages – in a case with actual damages of less than $18,000 – was grossly excessive and deprived Petitioner of substantive due process.

2. The Circuit Court acted contrary to law, justice, and Quicken Loans' right to due process of law by increasing the amount of punitive damages on remand, effectively punishing Quicken Loans for taking a lawful, good-faith, and partially successful appeal.

3. The Circuit Court deprived Quicken Loans of its right to substantive due process of law by repeatedly citing and relying on lawful conduct in supposed justification for its punitive damages award.

4. The Circuit Court erred by considering evidence of Quicken Loans' wealth in levying punitive damages; moreover, to the extent *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010), classified a defendant's wealth as an "aggravating" factor for purposes of punitive damages, it irreconcilably conflicts with the precedents of the United States Supreme Court and should be overruled.

5. The Circuit Court deprived Quicken Loans of its substantive right to due process by basing its reprehensibility finding on conduct dissimilar from that upon which liability for punitive damages was premised, as well as on harm or potential harm to persons other than Plaintiffs.

6. The Circuit Court's *Garnes* review was flawed in numerous respects, including failure to address the third *Gore* "guidepost" at all, and misconstruction of one factor so as to punish Quicken Loans for lawfully litigating the case.

7. The Circuit Court failed to obey the mandate of this Court that neither law nor equity permitted cancellation of Plaintiffs' debt; moreover, cancellation of a secured debt is impermissible in any event for the reasons explained by this Court in its November 21, 2012, opinion ("Opinion").

8. The Circuit Court failed to obey the mandate of this Court that the law does not favor forfeitures, and that a balancing of the equities in this case "requires" the restoration of the status quo as nearly as possible; moreover, the law disfavors forfeitures and requires restoration of the status quo for the reasons stated in the Opinion.

9. The Circuit Court erred by refusing to offset attorneys' fees with the settlement amount paid to Plaintiffs by co-defendants, given that this Court previously found those attorneys' fees to be compensatory.

10. The Circuit Court failed to obey the mandate of this Court that implicitly rejected Plaintiffs' request for an award of fees and costs on appeal and explicitly directed that each party would bear its own costs; moreover, as the Court's express mandate reflects, neither party substantially prevailed over the other in the prior appeal.

11. The Circuit Court's award of attorneys' fees was an abuse of discretion because it accepted without question or scrutiny time records that were vague, reconstructed, and in some instances inscrutable; much of the time claimed was in pursuit of punitive damages for common-law fraud, rather than a claim for which statutory fee-shifting is permitted; and it approved, without explanation, hourly rates considerably in excess of those previously found reasonable by Judge Recht.

INTRODUCTION AND STATEMENT OF THE CASE

This appeal is about the State of West Virginia's commitment to rational, fair remedies, and to proportional, fair punishments.

The decision on remand was an outrageous departure from those commitments and from this Court's explicit instructions designed to effectuate those commitments. In its apparent zeal to unload its grievances with the entire mortgage lending industry onto Quicken Loans – and to punish Quicken Loans for having the temerity to defend itself – the Circuit Court repeatedly defied this Court's directives, and imposed an extraordinary $3.5 million punitive damages award based on a series of shocking departures from law and basic fairness. Among other things, the Circuit Court:

- Imposed a $3.5 million penalty wildly out of proportion to the actual, purely economic, harm to plaintiffs – actual damages of less than $18,000 – based on isolated conduct by a single low-level employee;
- *Increased* the punitive damages by more than $1 million over the original massive punitive award, thereby improperly punishing Quicken Loans for pursuing a good faith, partially successful appeal;
- Improperly punished Quicken Loans for continuing to defend itself, observing that Quicken Loans "must now face the music" for failing to settle and comparing it to a Japanese soldier continuing to fight World War II;
- Completely ignored, without explanation, the third *BMW v. Gore* guidepost, which requires comparison of the punitive award to the civil statutory penalties for similar conduct – when W.Va. Code § 46A-5-101 permits a maximum penalty of *less than $5000* for such conduct.

- Unconstitutionally punished Quicken Loans for harm to others not before the Court, going so far as to condemn Quicken Loans for the nationwide hardship resulting from the sub-prime mortgage crisis;
- Unconstitutionally punished Quicken Loans for wholly lawful conduct, including the collection of lawful rates of interest, the offense of being a business seeking to earn profits, and conduct never challenged by Plaintiffs as unlawful; and
- Blatantly ignored this Court's directives, including this Court's rejection of forfeiture of the loan and instruction to restore the parties as nearly as possible to the *status quo ante*, this Court's ruling that Quicken Loans is entitled to an offset of compensatory damages, and its rejection of fees and costs on appeal.

This Court's cases make clear that even after a determination of liability, strict principles of fairness, proportionality, and due process constrain the remedial phase of judicial proceedings, and forbid unconstrained or disproportionate punishments. The Circuit Court's extraordinary and intemperate decision on remand badly disserved those principles, and the West Virginia judicial system's fundamental commitment to the rule of law. The judgment should be vacated, and the case should again be remanded for further proceedings consistent with the law, the federal and state constitutions, and this Court's original mandate.

Nature of the Case. In 2006, Respondent Lourie Brown (now Jefferson) contacted Petitioner Quicken Loans about refinancing her Wheeling home. L. Jefferson, Transcript Volume ("Vol.") II at 191 (A0001479[1]); A. Nuckolls, Vol. IV at 111-113 (A0001636-1637). She wanted to consolidate her debts – many of them high-interest, unsecured loans – into a new mortgage. Quicken Loans eventually lent her $144,800. She used the money to retire

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[1] Appendix pages are designated as "A__."

$69,349.82 in prior debt secured by her house, as well as high-interest, unsecured debts totaling $26,091.69. In addition, Lourie Brown walked away from closing with almost $41,000 in cash, which she used to buy a new automobile. The transaction reduced Ms. Brown's monthly debt service by over three hundred dollars, from $1,460 to $1,144. *See, e.g.*, QL Exs. 1, 4, 9-11, 13 (A0001831-1846).

Ms. Brown made two timely payments and then, even though her monthly debt payments were far lower than they had been before the refinancing, defaulted. Yet today she possesses a judgment against Quicken Loans for approximately $4.5 million, as well as the proceeds of a $700,000 settlement with a former codefendant, subject to a minor offset – in other words, over **$5 million** (with interest accumulating). And she need not pay back the loan, either. All in a case involving only conduct by a low-level corporate employee, no physical injury to anyone, and in which Plaintiffs dropped their claim for intentional infliction of emotional distress. How could our judicial system produce this astonishing result?

Plaintiffs filed this case in response to Quicken Loans' efforts, after Plaintiffs' missed payments, to foreclose on the collateral pledged for its loan. She contended generally that she had been the victim of an alleged "predatory lending" scheme, asserting primarily that Quicken Loans had lent her *too much* money given the value of her home, and that Quicken Loans had reneged on an alleged oral promise to refinance the loan after only three or four months. After a bench trial and subsequent hearing on fees and punitive damages, the Circuit Court canceled Plaintiffs' debt to Quicken Loans, and awarded Plaintiffs restitution of $17,476, attorneys' fees and costs of $596,199, and $2,168,868 in punitive damages. In a post-trial motion, Quicken Loans asserted its right to an offset of the judgment on account of the

codefendants' settlement, which the Circuit Court summarily denied. Quicken Loans appealed to this Court (No. 11-0910).

On appeal, this Court affirmed most liability findings, although it narrowed the grounds for the Circuit Court's finding of common-law fraud. *Quicken Loans, Inc. v. Brown*, 230 W.Va. 306, 737 S.E.2d 640 (2012) ("*Quicken I*"). This Court also held that an award of attorneys' fees under the Act constitutes compensatory damages and can be used in the "ratio" for purposes of punitive damages analysis. Syl. pt. 11, *id.* On the other hand, this Court found that the Circuit Court had seriously erred in several ways with respect to the relief awarded to the Plaintiff. First, this Court held that the debt cancellation was not authorized by law or equity under these circumstances. *Id.*, 737 S.E.2d at 659-662. Second, this Court held that forfeitures are not a favored remedy, and that – *in this case* – "a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible." *Id.* at 662. Third, this Court held that the Circuit Court had failed to perform a meaningful *Garnes*[2] procedural due process review of its punitive damages award, rendering the award utterly incapable of appellate review. *Id.* at 663-664. Finally, this Court held that because Plaintiffs had suffered a single, indivisible injury, they could receive only one recovery, and Quicken Loans was therefore entitled to a full offset of the proceeds of the codefendants' settlement against all compensatory damages. *Id.* at 668.

In their brief on that first appeal, Plaintiffs also requested that this Court award them fees and costs for defending the appeal. This Court did not; instead, it directed that each party bear its own costs, and it remanded with instructions that the Circuit Court dispose of the case in a manner consistent with its opinion. *Id.*; *see also* Mandate, *Quicken Loans Inc. v. Brown*, No. 11-0910 (Dec. 24, 2012).

[2] *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

On remand, the Circuit Court received briefing on the issues on remand and, at its request, on the question of awarding the Plaintiffs additional fees and costs. (A0000551-715, 759-890, 2292). A status conference was held on April 9, 2013, before the Circuit Court had reviewed the record. (A000716-758). No other hearings were held. In an order entered June 18, 2013 ("Remand Op."), the Circuit Court held that (i) notwithstanding this Court's directive to return the parties to the status quo, Plaintiffs would be freed of any obligation to repay the money loaned to them, leaving Quicken Loans with only a "valid lien" if the property is ever sold by the Plaintiffs "or their heirs, successors or assigns"; (ii) Plaintiffs should be awarded $3.5 million in punitive damages; (iii) Quicken Loans is not entitled to an offset of the attorneys' fee award, notwithstanding its "compensatory" character as determined by this Court; (iv) Plaintiffs were awarded "compensatory" damages in the amount of $116,276, consisting of $17,476 in restitution and a new award of $98,800 under Code 31-17-17(c), which award(s) were subject to the $700,000 offset; and (v) Plaintiffs were awarded an additional $279,033 in attorneys' fees and costs, bringing the total award of such fees and costs to $875,233. (A0000891-914, 2993).

In attempting to justify the $3.5 million punitive damages award, the Circuit Court purported to perform an analysis under *Garnes*, but ignored the third due process guidepost under *BMW of North America, Inc. v. Gore*, 517 US 559 (1996) ("*Gore*"), dealing with the civil penalty imposed for the conduct at issue. As for the factors that the Circuit Court did consider:

First, the Circuit Court held that there was a reasonable relationship between the punitive damages and actual or potential harm because it deemed *all* of the interest payments on the Loan to constitute harm. *See* Remand Op. at 8-9 (A0000898-899). Moreover, "[t]he fear and stress of being unable to manage a mortgage loan and the looming threat of losing one's home,

can only cause incalculable psychological harm and mental distress." *Id.* at 9 (A0000899). In addition, and notwithstanding that the interest rate on the Loan was perfectly lawful and had nothing to do with this *Garnes* factor, the Circuit Court called the interest payments "egregious," "despicable," and "boarderline [*sic*] criminal." *Id.* at 8 (A0000898). The court also looked at the harm to the economy as a whole from the subprime mortgage crisis: "'Sub-prime' loans and high-risk loans played a major role in triggering the crises. The economic damage was far-reaching and the effects are still felt everywhere nearly five (5) years later." *Id.* at 9 (A0000899).

Second, the Circuit Court held that Quicken Loans' conduct was "reprehensible at best" because "Quicken Loans' only motive in procuring Plaintiffs' mortgage loan was to turn an immediate profit." *Id.* The court further focused on a supposed violation of the title insurance statute, *id.* at 10-11 (A0000900-901), which was not litigated and for which there was never a finding of any violation. The court also held that "the most glaring example of this [mis]conduct is Quicken Loans's policy of encouraging its loan agents to charge surplus 'discount points' to borrowers without providing a reduction in the interest rate." *Id.* at 12 (A0000902). The court failed to mention that this Court had held that there was no valid finding of fraud regarding how Quicken Loans determined the price for Plaintiffs' discount points. *See Quicken I*, 737 S.E.2d at 655-56. Finally, the court emphasized that "Quicken Loans has refused to concede that it has engaged in any improper or illegal conduct," and therefore lacks "accountability." Remand Op. at 12, 14 (A0000902, 904).

Third, the Circuit Court held that Quicken Loans had an enormous potential profit, which rested on its treatment of all of the interest payments that Plaintiffs were supposed to make as "profit." *Id.* at 14 (A0000904).

Fourth, the Circuit Court held that there was a reasonable relationship between punitive and compensatory damages because there is a permissible ratio of 5:1 under of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992). Remand Op. at 15 (A0000905).

Fifth, the Circuit Court emphasized that Plaintiffs had significant attorneys' fees, *id.* at 16-17 (A0000906-907), utterly ignoring that it was simultaneously ordering Quicken Loans to pay all of those fees.

Sixth, the Circuit Court held that Quicken Loans' refusal to settle also justified the punitive damages award here. *See id.* at 18 (A0000908).

SUMMARY OF ARGUMENT

The Circuit Court's disposition of the remand should have been relatively straightforward. This Court had mandated and instructed it to (1) avoid debt cancellation and such inequitable forfeitures, and instead attempt to equitably restore the parties to the status quo; (2) apply an offset to all compensatory damages awarded for the settlement with Quicken Loans' co-defendants; and (3) perform the required due process analysis and review of any punitive damages award. Remarkably, the Circuit Court repeatedly defied this Court's simple directives. To be clear, the Circuit Court did not merely interpret this Court's opinion in an unconventional way; rather, the Circuit Court repeatedly did exactly what this Court forbade. The Circuit Court did not hide its motives, either: it sought to punish Quicken Loans for all of the ills of the sub-prime mortgage crisis, for having a profit motive, and for having the temerity to defend itself in this case. Indeed, the Circuit Court went out of its way to disparage Quicken Loans with inflammatory remarks – calling Quicken Loans' conduct "boarderline [*sic*] criminal," inviting class action litigation, and comparing Quicken Loans' belief in the merit of its case to Japanese soldiers who fought on from their jungle hideouts long after everyone else stopped fighting

World War II. *See* Remand Op. at 8, 12, 14 n.13 (A0000898, 902, 904 n.13). It should go without saying that these rhetorical excesses do not provide useful benchmarks to cabin rational descisionmaking, much less a permissible basis for ignoring the dictates of this Court and basic principles of law.

A number of specific errors require this Court's intervention:

First, the $3.5 million punitive damages award is absurd and a plain violation of due process. The Circuit Court performed a wholly inadequate – and materially incomplete – *Garnes* analysis that repeatedly substituted intemperate rhetoric for reasoned inquiry, and punished Quicken Loans on a series of improper bases. To begin with its incompleteness: the Circuit Court ignored that the legislatively prescribed *maximum* civil penalty for the conduct at issue was less than $5,000, a key due process consideration. It then compounded its error by committing numerous other errors with respect to the factors it did address. For example, it found reprehensible Quicken Loans' pricing of discount points, which this Court had already held did not support the fraud claim for which punitive damages could be awarded; it treated Quicken Loans' "potential" profit (and a grossly inflated calculation of potential profit, at that) as an aggravating factor, even though this Court's precedents required the Circuit Court to look at actual profit; it treated Quicken Loans' refusal to settle this case as an aggravating factor, even though the court was supposed to look at the effect on settlements in *other* cases under this Court's precedents; and it treated Plaintiffs' litigation costs as an aggravating factor, even though it is Quicken Loans, not Plaintiffs, that has been ordered to pay those costs.

More generally, it is impossible that Quicken Loans could have had advance *notice* that it would be subject to a $3.5 million punitive damages award in a case with actual damages of (at most) $17,476.72, and such notice is the touchstone of substantive due process.

Furthermore, the Circuit Court's decision to increase the punitive damages award on remand is itself a violation of due process, as it punishes Quicken Loans for exercising its right to appeal – in this case, an appeal that was successful on several issues.

Second, the Circuit Court's cancellation of Plaintiffs' debt is flatly contrary to this Court's holding that cancellation was impermissible and its directive that the parties be restored to the status quo. Indeed, the Circuit Court openly relied on a statute – and an interpretation of that statute – that this Court expressly rejected as a basis for debt cancellation.

Third, the Circuit Court acted contrary to this Court's holdings in refusing to offset attorneys' fees with the settlement amount paid by co-defendants. The offset is required by the combined effect of two holdings of this Court: (a) compensatory damages are subject to offset; and (b) attorneys' fees are compensatory.

Fourth, the Circuit Court's award of attorneys' fees and costs on appeal and remand openly conflicts with this Court's holding that the parties should bear their own costs. It also conflicts with the rule that fees are awarded only to a substantially prevailing party, inasmuch as the results of the appeal were mixed and the remand focused almost exclusively on issues for which Quicken Loans had prevailed on appeal. Moreover, even if fees on appeal and remand were permissible, the Circuit Court's acceptance of all supposed fees without scrutiny was an abuse of discretion.

Fifth, the Circuit Court's new award of an additional $98,800 in purportedly "compensatory" damages (the difference between the amount of the Loan and the actual value of the Property) has no legal basis. Compensatory damages were not a proper subject for remand because they were not at issue on appeal, and, in any event, the $98,800 was a windfall to Plaintiffs – Quicken Loans' provision to Plaintiffs of $98,800 more than their property was

worth (much of which Mrs. Jefferson used to purchase a new car) was in no sense a harm, and certainly not a "harm" that could be "compensated" by (first) relieving them of any obligation to pay the money back and (second) providing them with yet another $98,800. This "award" was simply another punitive forfeiture prohibited by law, equity, and this Court's mandate. For it to then be used as a predicate for a further punitive damages award is bizarre.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Quicken Loans respectfully submits that this case must be set for argument under Rule 20 of the West Virginia Rules of Appellate Procedure. This case involves (1) issues of fundamental public importance, including whether the Circuit Court's decision defied this Court's mandates; and (2) important constitutional issues regarding a $3.5 million punitive damage award in a case with actual damages of (at most) $17,476.72, and whether increasing a punitive damages award by well over $1 million on remand violates due process where the only intervening event is the defendant's good-faith, partially successful appeal.

ARGUMENT

1. The Circuit Court's $3.5 million award of punitive damages – in a case with actual damages of less than $18,000 – was grossly excessive and deprived Petitioner of substantive due process.

This Court is constitutionally required to review the Circuit Court's award of punitive damages *de novo*. *See State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (noting that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), "mandated appellate courts to conduct *de novo* review" of awards of punitive damages applying the guideposts announced in *Gore*, 517 U.S. 559).

The grossly disproportionate \$3.5 million punitive damages award in this case demonstrates why such "*[e]xacting* appellate review"[3] is so necessary to constrain the temptation to punish excessively or on improper grounds, and as a corrective to the tendency to justify any and all punishment by uncritically labeling the conduct at issue as particularly reprehensible.

All fraud is of course wrongful and potentially worthy of punishment, but the law requires a careful judgment, a reasoned assessment of *how* blameworthy the fraud is. Here the Circuit Court disregarded numerous factors placing the purported fraud at issue toward the low end of the reprehensibility scale: the fraud claim on which the award was based turned on low-level conduct specific to Mrs. Jefferson's loan, not on any company-wide policy; only economic harm, and no physical harm, was implicated; and the conduct at issue was not an elaborate scheme but, at worst, a single instance of a mistaken promise and a disclosure that may not have been precise enough until after closing. The Circuit Court also disregarded that our Legislature has made clear that the maximum penalty for this kind of consumer fraud is approximately \$4,744 – a critical consideration under *BMW v. Gore*, and, at least since *Perrine*, an integral part of a comprehensive *Garnes* analysis. *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815, 895 (2010); *see* W.Va. Code §§ 46A-5-101, 106. Any substantial award is therefore disproportionate to the actual misconduct in this case and to the statutory penalties for such misconduct. And, as discussed below, it would also be grossly disproportionate to the actual harm to Plaintiffs.

To guide courts in assuring that punitive damages awards comport with due process, *Gore* announced three "guideposts" for substantive due process review of a punitive damages award:

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[3] *State Farm*, 538 U.S. at 418 (emphasis added).

- the degree of reprehensibility of the conduct;
- the disparity between the award and the harm or potential harm suffered; and
- the difference between the award and the civil penalties authorized or imposed in similar cases.

517 U.S. at 575. All of these factors – the third of which the Circuit Court ignored entirely – establish that the Circuit Court's extraordinary punitive damages went far beyond the bounds of due process and cannot be sustained. Multiple other ways that the Circuit Court's decision runs afoul of due process are discussed as separate assignments of error below.

Reprehensibility. Under any proper analysis, the conduct at issue in this case measures low on the reprehensibility scale. The Supreme Court has instructed courts examining reprehensibility to

> consider[] whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419.

These factors point overwhelmingly toward a conclusion contrary to that reached by the Circuit Court. Here, there was no physical harm, and no threat to health or safety. The conduct at issue was one-time conduct by lower-level employees, not wrongdoing that was authorized by company officers or that represented corporate policy. There was no evidence, and no finding, that any other borrower has been made a promise of refinancing, by Heidi Johnson or anyone else. There was also no proof that any other borrower *may not* have seen the

amount of a balloon payment because the federal Truth-in-Lending disclosure *may not* have been presented before closing.[4]

The isolated nature of the alleged misconduct necessarily makes it significantly less reprehensible than persistent wrongdoing or conduct authorized by corporate decisionmakers. *See State Farm*, 538 U.S. at 419 (distinguishing "repeated actions" from "an isolated incident"); *Perrine*, 694 S.E.2d at 895 n.93 (misconduct of defendant had "occurred over a long period of time," unlike cases relied on by the defendant which involved "isolated events"). The conduct at issue necessarily ranks low on the scale of reprehensibility.

Disparity Between Award and Harm. The disparity between the award and the only legitimate harm in this case – less than $18,000 in restitution – is vast. None of the other amounts cited by the Circuit Court to inflate the purported harm withstands scrutiny. The loan principal of $144,800 plainly cannot constitute a harm because any such harm was immediately offset by Plaintiffs' receipt and beneficial use of every penny of the loan. The Circuit Court suggested that *all* of the scheduled interest payments constituted harm, *see* Remand Op. at 8 (A0000898), but treating the entire finance charge for a mortgage as harm defies reason. Interest payments at a market rate of interest – and there is no claim the interest rates were

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[4] In finding that the amount of the balloon payment was concealed until after closing, this Court relied heavily on its observation that the federal Truth-in-Lending disclosure in the Jefferson loan file, although bearing the date of the closing, was not actually signed until several weeks later. 737 S.E.2d at 654 n.27. From this delayed signature, the Court concluded that "it *appears* that Plaintiffs was not *presented* with this document prior to or on the date of closing." *Id.* (emphasis added). With all respect to the Court, the record suggests otherwise. The very *first* page of *Plaintiffs'* Exhibit 5 – which they described as the "Browns' Copy of the Closing File" (A0000155) – is an unexecuted copy of the Truth-in-Lending Statement. (A0002437). In other words, although it is undeniable that Plaintiffs did not sign the Statement at closing, it is highly likely that they had been "presented" with it in advance thereof.

unconscionably high – represent the legitimate price of borrowing money, not a "harm" to the borrower.[5]

The Circuit Court likewise erred in relying on harm that had nothing to do with this case. In particular, the Circuit Court pointed to the "economic damage" of the sub-prime mortgage crisis. But there is no relationship between the conduct here and the sub-prime mortgage crisis, and, in any event, harm to others is an unconstitutional basis for punitive damages. *See Philip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007).

Civil Penalty. Under *Gore*, the relevant civil penalty amount has great significance because it represents a considered societal judgment of the appropriate sanction for a given offense. *Gore*, 517 U.S. at 583; *see United States v. Bajakajian*, 524 U.S. 321, 336 (1998) ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature"). In *Perrine*, this Court gave this guidepost little weight on the facts before it, citing the great disparity between the conduct at issue in the case and the typical conduct contemplated by the analogous statutory civil penalty. 694 S.E.2d at 895. But here, unlike in *Perrine*, the third *Gore* guidepost should carry considerable weight. Rather than an extraordinary case far outside of the purview of the statute containing the penalty provision, this case is precisely the sort of single-plaintiff, single-transaction consumer case for which the

[5] Similarly, the facts belie the Circuit Court's conclusion that Plaintiffs' risk of losing their house constituted potential harm. According to Plaintiffs' own evidence, Plaintiffs had no equity in the home to lose before the Quicken Loans refinancing: she owed $69,349.82 to CitiFinancial on her existing mortgage (*see* A0002438), and her house was worth only $46,000 (*Quicken I*, 737 S.E.2d at 648). Moreover, given that Ms. Jefferson defaulted on her Quicken Loans mortgage payments of $1,144 per month, she very likely would have defaulted on her pre-existing loans, which required monthly payments of $1,460. In short, the Quicken Loans mortgage was not the *cause* of Ms. Jefferson's default, and she had no equity in the house to lose. *See Simon v. San Paolo US Holding Co.*, 113 P.3d 63, 73-75 (Cal. 2005) ("potential harm" under *TXO* is limited to harm that is likely to be caused by the defendant's conduct).

WVCCPA's penalties were designed. The paradigm for application of the third guidepost is this very case.

Alas, the Circuit Court ignored this guidepost – rendering its *Garnes* analysis incomplete *per se* – and which, when applied, demonstrates that the punitive damages award here is wildly excessive. The penalty set forth by the legislature for fraudulent conduct by a creditor is quite modest:

> If a creditor has violated the provisions of this chapter applying to . . . illegal, fraudulent or unconscionable conduct, . . . the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

W.Va. Code § 46A-5-101. Although the maximum penalty can be adjusted upward for inflation since 1974 in the discretion of the court (*id.* § 46A-5-106), that maximum now stands at only about $4,744.[6] Thus, the $3.5 million punitive damages award is approximately *738 times* the civil penalty. This disparity demonstrates not only that the award is excessive for the conduct alleged, but that notice of the size of the punitive damages award would have been impossible.

2. The Circuit Court acted contrary to law, justice, and Quicken Loans' right to due process of law by increasing the amount of punitive damages on remand, effectively punishing Quicken Loans for taking a lawful, good-faith, and partially successful appeal.

The Circuit Court's decision to increase the punitive damages award on remand, above the previous award of $2,168,868.75, following a lawful, good-faith, and partially successful appeal, imposed an unjust and unconstitutional "chilling impediment" on "the right to appeal." *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1199 (9th Cir. 1986). Penalizing an appeal by imposing an increased punitive damages award – especially

[6] *See* http://www.bls.gov/data/inflation_calculator.htm (accessed October 13, 2013). The maximum penalty at the time of trial would have been approximately $4,350, and at the time of the loan just $4,090. *Id.*

where the proceedings on remand were all devoted to issues upon which that appeal was *successful* – is fundamentally unfair and violates due process.

Furthermore, the Circuit Court's use of attorneys' fees incurred on appeal to support an increase in punitive damages compounds this error. The inclusion of such fees in the punitive-to-compensatory damages ratio directly punishes Quicken Loans for exercising its right to appeal. Due process does not permit forcing a party to choose between accepting a punitive damages award that (as this Court held) improperly failed to apply the law, and facing a larger punishment for challenging the original, unlawful award.

3. The Circuit Court deprived Quicken Loans of its right to substantive due process of law by repeatedly citing and relying on lawful conduct in supposed justification for its punitive damages award.

No one may be punished for doing what the law plainly allows. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Gore*, 517 U.S. at 572-73. The Circuit Court not only did so, but appeared to focus its displeasure on Quicken Loans' decisions to litigate this matter and pursue all legal redress for what it has believed (and continues to believe) to be the Circuit Court's serious legal errors and consequent unjust judgments. "[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Bordenkircher*, 434 U.S. at 363 (quotation omitted). Likewise, the Circuit Court's reliance on Quicken Loans' use of discount points, *see* Remand Op. at 12 (A0000902), ignores the fact this Court held that this conduct did not support a claim of fraud. *Quicken I*, 737 S.E.2d at 655-56.[7] And the Circuit Court further relied on a supposed violation of W.Va. Code § 33-11A-11(c) in how Quicken Loans obtained title insurance (*see* Remand Op.

[7] More generally, the Circuit Court's emphasis on the idea that Quicken Loans' "motive in procuring Plaintiffs' mortgage loan was to turn an immediate profit," Remand Op. at 9 (A0000899), is irrelevant because a profit motive is not only lawful, but is the foundation of our free enterprise economy.

at 10-12 (A0000900-902)), yet the trial court never found any violation of this statute, and Plaintiffs did not argue on remand that Quicken Loans violated this statute.[8]

4. **The Circuit Court erred by considering evidence of Quicken Loans' wealth in levying punitive damages; moreover, to the extent *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010), classified a defendant's wealth as an "aggravating" factor for purposes of punitive damages, it irreconcilably conflicts with the precedents of the United States Supreme Court and should be overruled.**

Although syl. pt. 3 of *Garnes* deemed "the financial position of the defendant" to be merely "relevant," *Perrine*'s sorting of factors made it into an "aggravating" one. To the extent that this might be interpreted as allowing punitive damages to be increased based on the defendant's wealth, this Court clearly erred. It is patently improper and unconstitutional for wealth alone to be used as an "aggravating" factor in the imposition of punishment. A state court may never use a defendant's wealth as a stand-alone basis for enhancing an award – *never.* Although the defendant's wealth is commonly mentioned in *Haslip*-derived lists of relevant factors for procedural due process analysis, it is conspicuously *absent* from the *Gore* substantive due process guideposts that define the outer limit of constitutionally permissible punishment. Why? Because, as the *State Farm* Court explained, "[t]he wealth of a defendant cannot justify an *otherwise unconstitutional* punitive damages award." 538 U.S. at 427 (emphasis added).[9] In other words, once the maximum punishment permitted by the Constitution for given misconduct causing a given amount of harm is determined (using the *Gore* guideposts), it has been determined for *all defendants*, and a given defendant's ability to pay more cannot warrant a higher penalty.

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[8] Moreover, this statute cannot support punitive damages, which are based solely on the fraud claim.

[9] *See also Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994) (lamenting that "presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express bias against big businesses, particularly those without strong local presences").

If its conduct warrants punishment, Quicken Loans may be punished for that conduct, but it may not be punished simply because it is a successful business. Because Quicken Loans does not contend – and has never contended – that it would be unable to pay an "*otherwise* constitutional" punitive damages award, this *Garnes* factor can be of no consequence to any court's punitive damages analysis.

Although it purported to "agree" with Quicken Loans that wealth cannot justify an otherwise unconstitutional punitive damages award, the Circuit Court nonetheless considered it, ostensibly to assure that Quicken Loans "has the ability to pay a fair and reasonable punitive damages award." But again, because Quicken Loans *did not contend otherwise*, and wealth is *not* one of the *Gore* guideposts, any use of evidence of wealth could *only* have contributed to the unconstitutionally excessive award that resulted. Moreover, if the Circuit Court obeyed *Perrine*, then that is precisely what happened. In reversing the award, this Court should take this opportunity to correct *Perrine*'s misclassification of wealth as an "aggravating" factor and restate the governing law of punitive damages: under the United States Constitution, wealth may never be an "aggravating factor."

5. The Circuit Court deprived Quicken Loans of due process by basing its reprehensibility finding on conduct dissimilar from that upon which liability for punitive damages was premised, as well as on harm or potential harm to persons other than Plaintiffs.

The Supreme Court has repeatedly emphasized that a defendant may be punished only for harm to the plaintiff before the court, and only for the conduct at issue in the case. The reprehensibility inquiry is *not* a license for a comprehensive moral audit of the defendant: "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm*, 538 U.S. at

422-423. Accordingly, "[a]lthough our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, in the context of civil actions courts must ensure the conduct in question *replicates* the prior transgressions." *Id.* at 423 (emphasis added; citation and quotation omitted).

Similarly, harm or potential harm to persons not before the Court may not be a basis for punitive damages: "the Constitution's Due Process Clause forbids a State to use a punitive damages award for injury that it inflicts upon nonparties[.]" *Philip Morris*, 549 U.S. at 353; *see Perrine*, 694 S.E.2d at 877 (recognizing and applying *Philip Morris*). Moreover, considering merely *potential* harm *to others* diverges even further from what the Constitution permits. "We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*." *Philip Morris*, 549 U.S. at 354 (emphasis in original; citing *State Farm*, 538 U.S. at 424).

Yet, in this case, the Circuit Court expressly justified its punitive award based in part on a connection it drew between the loan in this case and the 2008 financial crisis – including harm to the entire "global economy." Remand Op. at 9 (A0000899). This punishment of Quicken Loans for its purported role in harm to others is flatly unconstitutional.

6. The Circuit Court's *Garnes* review was flawed in numerous respects, including failure to address the third *Gore* "guidepost" at all, and misconstruction of one factor so as to punish Quicken Loans for lawfully litigating the case.

Several of the errors committed by the Circuit Court in its review under *Garnes* are addressed in the assignments of error above, including its gross exaggeration of the reprehensibility of Quicken Loans' conduct, as well as consideration of its lawful conduct, of

dissimilar conduct, of its wealth, and of potential harm to persons or entities other than the Plaintiffs.

This assignment of error focuses on five specific deficiencies in the Circuit Court's analysis. First, the Circuit Court misapplied the "aggravating" factor concerning the "appropriateness of punitive damages to encourage settlement" from syllabus point 4 of *Garnes*. As the Court made clear in *Perrine*, 694 S.E.2d at 888-889, this factor is *not* intended to permit a court to punish the defendant for failing to settle the case before it. Yet the Circuit Court used it in precisely that way, remarking that because Quicken Loans had stood on its rights rather than settle the case, it must now "face the music." Remand Op. at 18 (A0000908).

Second, the Circuit Court utterly failed to address the federal substantive due process guideposts as this Court required in *Perrine*, 694 S.E.2d at 895. In particular, the third "guidepost" is both missing from and has no proxy factor in a *Garnes*-only analysis, and that factor – comparison with civil penalties authorized or imposed in similar cases – should carry great weight in this case. *Gore*, 517 U.S. at 583.

Third, the Circuit Court grossly inflated the compensatory/punitive multiplier by improperly including in the "compensatory" figure nearly $100,000 in forfeitures awarded for merely *negligent* conduct, which cannot support punitive damages. Although its holding on this point is not entirely clear, the Circuit Court appears to have awarded Plaintiffs $98,800 on account of Quicken Loans' *negligent* violation of the appraisal statute. Remand Op. at 19, 24 (A0000909, 914). Of course, the law requires "more than a showing of simple negligence to recover punitive damages." *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 671, 379 S.E.2d 388, 394 (1989). Harm from negligent conduct cannot support punitive damages.

Fourth, and notwithstanding this Court's prior holding as regards the "compensatory" nature of an award of attorneys' fees and costs under the Consumer Protection Act, use of such an award – whatever its label under state law – as a supposed justification to *enhance* punitive damages is illogical and unconstitutional. Indeed, the United States Supreme Court has not counted such fees as compensatory damages in calculating the permissible ratio, even when it has been urged to do so. *State Farm*, 538 U.S. at 425-426. Here, the attorneys' fees make up such a large portion of the purportedly compensatory damages that the punitive-to-compensatory ratio analysis has lost all relation to the minimal actual harm in the case, and become little more than an exercise in comparing the punitive award to the cost of litigation – a function far removed from the purposes of the ratio as set forth in cases like *State Farm*.

And fifth, the fee award in this case was pursuant to a statute – the Consumer Credit and Protection Act – that does not authorize punitive damages awards for violations, and the syllabus point announcing this Court's holding as regards their inclusion in punitive damages ratios was the only new one announced in the Opinion. It was, therefore, a new point of law, and as regards punitive damages, such pronouncements should apply only prospectively. Again, due process entitles a defendant to fair *advance* notice of the conduct for which a state may impose a punishment and the size of the penalty that the state may impose for that particular misconduct. *Gore*, 517 U.S. at 574. Quicken Loans did not have, and could not have had, fair advance notice that the Court might authorize punitive damages in addition to and on the basis of an attorneys' fee award, let alone a fee award under the Consumer Protection Act.

7. **The Circuit Court failed to obey the mandate of this Court forbidding cancellation of Plaintiffs' debt; moreover, such cancellation of a secured debt is impermissible in any event for the reasons explained by this Court in its Opinion.**

and

8. **The Circuit Court failed to obey the mandate of this Court that the law does not favor forfeitures, and that a balancing of the equities "requires" the restoration of the status quo as nearly as possible; moreover, the law disfavors forfeitures and requires restoration of the status quo for the reasons stated in the Opinion.**

The Circuit Court's order effectively cancelling Plaintiffs' obligation to repay the principal of the loan blatantly violates both this Court's mandate and its binding interpretation of West Virginia law. Needless to say, "[a] trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." Syl. pt. 3 (in part), *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003).

This Court's mandate, as well as its instructions for remand, could not have been clearer – cancellation of the debt in this case is not a permissible remedy, and the equities require returning the parties as nearly as possible to the *status quo*. To begin with, the Court considered the two provisions of the Consumer Credit and Protection Act that authorize outright debt cancellation (W.Va. Code §§ 46A-5-101(2) and -105), and held that neither applied to a secured debt that is not a "regulated consumer loan." 737 S.E.2d at 659. Second, the Court held that a merely negligent violation of W.Va. Code § 31-17-8(m)(8) cannot justify cancellation of a debt. *Id.* at 660 (citing W.Va. Code § 31-17-17(a)). Third, the Court held that the authorization in W.Va. Code § 46A-2-121, to "refuse to enforce" an unconscionable contract, must be read *in pari materia* with the specific language in the Consumer Credit and Protection Act limiting a court's power to cancel a debt; hence, debt cancellation was limited to the specific circumstances described in W.Va. Code §§ 46A-5-101(2) and -105, which are not present here. *Id.* at 660-661.

Finally, this Court held that cancellation is an improper remedy for unfair and deceptive acts because, while that statute allows for equitable relief, equity strongly disfavors forfeitures. *Id.* at 662. This Court then made perfectly clear what equitable remedy, rather than cancellation, was permissible: "*This Court finds that a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible.*" *Id.* at 662 (emphasis added; footnote omitted). This Court also made clear what constituted a return to the status quo: unwinding the transaction entirely, with the Plaintiffs returning the monies lent them. Specifically, this Court approvingly cited a case for the proposition that where the "seller who entered into contract to sell real estate was found to have been incompetent, [the] Circuit Court *properly directed her to return full purchase price*, thereby balancing the equities in terms of returning the parties to the status quo ... 'as far as possible.'" *Id.* at 662 (emphasis added; quoting *Go Mart, Inc. v. Olson*, 198 W.Va. 559, 563, 482 S.E.2d 176, 180 (1996)); *see also* Restatement (Second) of Contracts § 384 (party seeking restitution must "return[] or offer[] to return, conditional on restitution, any interest in property that he has received").

The Circuit Court's decision on remand blatantly disregarded this Court's crystal-clear holding that the parties should be returned to the status quo. In direct opposition to this Court's instructions, the Circuit Court held that "Plaintiffs are entitled to some form of meaningful relief ***other than*** *the status quo*." Remand Op. at 5 (A0000895) (emphases added). The "relief other than the status quo" that the Circuit Court imposed was precisely the inequitable windfall remedy – cancellation of Plaintiffs' debt – of which this Court so forcefully disapproved. The Circuit Court ordered that "Plaintiffs shall have no further legal obligation to repay to Quicken Loans the Note executed by the Plaintiffs, and Quicken Loans shall have no further legal rights under the terms of said Note and Deed of Trust." Remand Op. at 6, 23

(A0000896, 913). Moreover, the purported legal rationale for the Circuit Court's action is one that the Court expressly rejected. The Circuit Court held that it "has the authority to refuse to enforce the Note and Deed of Trust in this case pursuant to the provisions of West Virginia Code § 46A-2-121(1)(a)." *Id.* at 6 (A0000896). But this Court specifically addressed the "refuse to enforce" provision of § 46A-2-121(1)(a), and held that it did not allow for cancellation of a secured debt. 737 S.E.2d at 661. The Circuit Court ignored this holding.

To be sure, notwithstanding that it declared that Quicken Loans had no right to enforce the Deed of Trust, the Circuit Court's opinion did state that "[t]he Deed of Trust executed by the Plaintiffs shall remain a valid lien on the Plaintiffs' real property," whereby "[i]n the event of the sale of Plaintiffs' real property by Plaintiffs, or their heirs, successors or assigns, . . . Quicken Loans will be entitled to receive all of the net proceeds from the sale up to the principal amount of the loan made to Plaintiffs ($144,800.00)." Remand Op. at 6, 23 (A0000896, 913) (footnote omitted). This unique "lien" can be rendered worthless at the whim of Plaintiffs, who need never sell the property and may apparently freely pass it to "heirs" or "assigns" without satisfying the phantom lien. In any event, Quicken Loans submits that this remotely contingent "lien" cannot hide the Circuit Court's effective cancellation of the debt, and surely does not constitute an attempt to return *both* parties to the "status quo as nearly as is possible." The Circuit Court defied the mandate, defied equity, and plainly erred.

And the Circuit Court did not stop there. In addition to cancelling the Plaintiffs' debt, the Circuit Court fashioned a brand new award of $98,800 under Code 31-17-17(c) for the negligent violation of the appraisal statute. After trial, the Circuit Court made no such award, and potential damages under the appraisal statute were beyond the scope of the remand. But even if the Circuit Court could have addressed the issue on remand, the $98,800 amount was not

a *harm* to Plaintiffs, and was therefore not a proper basis for compensatory damages. A plaintiff who has not suffered damages is not entitled to damages. *Absure, Inc. v. Huffman*, 213 W.Va. 651, 584 S.E.2d 507, 511 (2003). The Circuit Court made no attempt to explain how the receipt of another $98,800 would remedy the "harm" of having already received it (and had the obligation to repay it forgiven to boot). Hence, the $98,800 award is yet another inequitable forfeiture and represents a pure windfall to Plaintiffs.

9. The Circuit Court erred by refusing to offset attorneys' fees with the settlement amount paid to Plaintiffs by co-defendants, given that this Court previously found those attorneys' fees to be compensatory.

The Circuit Court further defied this Court's mandates by refusing to offset the Plaintiffs' Guida settlement against the award of attorneys' fees. This Court's decision as to offset was perfectly clear: "Plaintiff suffered a single indivisible loss arising from the actions of Quicken and the settling co-defendants. Quicken is therefore entitled to a credit for the settlement between Plaintiff and the appraisal defendants . . . ." *Quicken I*, 737 S.E.2d at 668. Moreover, this Court recognized that Quicken is "entitled to a reduction of the compensatory damage award, but not the punitive damage award." *Id.* (quoting Syl. Pt. 1, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)). Thus, Quicken Loans is entitled to offset of compensatory damages.

This Court was equally clear in deeming attorneys' fees to constitute compensatory damages. This Court rejected "Quicken's contention that attorneys fees are punitive in nature and not compensatory," instead concluding that "fee-shifting statutes," including the one at issue here (West Virginia Code § 46A-5-104) "are compensatory and not punitive in nature." *Id.* at 666. For this reason, the Court held that "attorneys fees and costs awarded under West Virginia Code § 46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act shall be included in the compensatory to punitive damages ratio." *Id.* at 666-

67. This should end the matter: Compensatory damages are subject to offset, and if attorneys' fees are compensatory,[10] they too are subject to offset.

There is no legal or logical basis for treating attorneys' fees as compensatory for purposes of calculating punitive damages but not for purposes of offset. Simply put, if attorneys' fees are compensatory, then they should be treated like all other kinds of compensatory damages, which are subject to offset.

The only case the Circuit Court cited in support of its contrary holding is one in which the court did not decide the issue, but rather expressed doubt about the propriety of an offset before providing offset on other grounds. *See Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 894 (2d Cir. 1988). In a case where the court actually decided the issue, it held that offset is applicable to attorneys' fees. *See, e.g., Corder v. Brown*, 25 F.3d 833, 840 (9th Cir. 1994) ("We hold here that a non-settling defendant is entitled to offset attorneys' fees owed by the amount already paid by settling defendants. Defendant-appellant has presented a persuasive argument, highlighting the unfairness and unreasonableness of denying an offset."). In any event, the Circuit Court was bound to follow *this* Court's commands, and it did not. Quicken Loans is entitled to full use of the $700,000 offset against all "compensatory" damages.

10. The Circuit Court failed to obey the mandate of this Court that implicitly rejected Plaintiffs' request for an award of fees and costs on appeal and explicitly directed that each party would bear its own costs; moreover, as the Court's express mandate reflects, neither party substantially prevailed over the other in the prior appeal.

In the first appeal, Plaintiffs expressly requested that this Court award them their fees on appeal. Brief of Respondents at 49 (A0000460) ("Respondents should be awarded

[10] As set out above, *see supra* Argument Part 6, Quicken Loans preserves its argument that attorneys' fees and costs should not be considered compensatory damages, for purposes of punitive damages or otherwise. But if they are so considered, then Quicken Loans must be entitled to its offset.

attorney fees for defending this appeal under [W.Va. Code] § 46A-5-104 and § 31-17-17."). The Court ignored Plaintiffs' request and awarded them nothing.

The law concerning adherence to this Court's mandate bears repeating here: "a trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." Syl. pt. 3 (in part), *State ex rel. Frazier & Oxley*. Among the "circumstances" necessarily "embrace[d]" by this Court's prior opinion was Plaintiffs' fee request and its rejection by this Court. *Id.*, 591 S.E.2d at 735 (noting that the mandate of the Court includes matters decided "implicitly" on appeal); *Hatfield v. Painter*, 222 W.Va. 622, 671 S.E.2d 453, 463 (2008) (same). Nevertheless, the Circuit Court awarded *another* $279,000 in fees and costs to Plaintiffs, most of which reflected the very time spent on appeal for which they had unsuccessfully sought an award by this Court.

A Circuit Court may not award fees on remand for a prior appeal where the mandate had not included a directive to do so. *See Powell v. Paine*, 226 W.Va. 125, 697 S.E.2d 161, 165 (2010) (where mandate of this Court had directed simply the reinstatement of the appellant's teaching license, circuit court was not empowered to award attorneys' fees or other relief). Here, not only did this Court's opinion and mandate decline to award fees to Plaintiffs, it refused to even award them the modest "costs" available to a prevailing party on appeal. *See* W.Va. R. App. P. 24(a). Instead, the mandate of the Court provided, in relevant part: "[t]he decision of the circuit court is hereby affirmed, in part; reversed, in part, and remanded with directions, and *it is hereby ordered that the parties shall each bear their own costs*." Mandate, *Quicken Loans Inc. v. Brown*, No. 11-0910 (Dec. 24, 2012) (emphasis added).

This direction as to costs also precludes the Circuit Court's supplemental fee award because the test for deciding whether to award a party costs is the same applicable to

statutorily authorized fee-shifting: whether that party "substantially prevailed" on appeal. *See, e.g.*, W.Va. Code § 59-2-11 ("[I]n every case in an appellate court costs shall be recovered in such court by the party substantially prevailing."); *e.g.*, *Chesapeake & Potomac Telephone Co. v. City of Morgantown*, 143 W.Va. 800, 105 S.E.2d 260, 276 (1958). Accordingly, this Court's decision that Plaintiffs not recover their costs necessarily means that Plaintiffs failed the test for attorneys' fees. The Circuit Court therefore plainly erred in shifting yet another quarter-million dollars of fees onto Quicken Loans.

The Circuit Court's further award of fees and costs accrued on remand is, if anything, even more clearly improper than the award of fees and costs on appeal. *All* of the litigation on remand concerned issues on which Quicken Loans was successful on appeal: punitive damages, cancellation of the Loan, and offset. It would make no sense for Quicken Loans to pay Plaintiffs' fees and costs for a remand necessitated by the Circuit Court's errors in Plaintiffs' favor (and Plaintiffs' defense of those errors). In any event, as explained throughout this brief, the Circuit Court's rulings on remand in Plaintiffs' favor directly conflict with this Court's decision. And if Quicken Loans is ultimately successful on the remand issues in this Court, then Plaintiffs cannot be entitled to attorneys' fees and costs as a prevailing party.

11. The Circuit Court's award of attorneys' fees was an abuse of discretion because it accepted without question or scrutiny time records that were vague, reconstructed, and in some instances inscrutable; much of the time claimed was in pursuit of punitive damages for common-law fraud, rather than a claim for which statutory fee-shifting is permitted; and it approved, without explanation, hourly rates considerably in excess of those previously found reasonable by Judge Recht.

Even if it were permissible to award additional attorneys' fees, the Circuit Court's unquestioning acceptance of *all* of Plaintiffs' supposed fees and costs constitutes an abuse of discretion.

First, the award was erroneous because the time devoted to the punitive damages issue is not compensable. Punitive damages, if any, can be awarded solely on account of Plaintiffs' common-law fraud claim. *See Quicken I*, 737 S.E.2d at 666 ("[P]unitive damages are available to Plaintiff because there was a finding of common law fraud."). And the fee award was expressly made pursuant to W.Va. Code § 46A-5-104, not for the common-law fraud claim (for which no statutory fees are available). *See* 2/25/10 Op. at 20 (A145). Thus, the time spent on punitive damages concerned a claim for which fees are unavailable, and therefore that time cannot be included in the calculation of fees. *See* Syl. pt. 5, *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Envt'l Protection*, 193 W.Va. 650, 458 S.E.2d 88 (1995) ("Apportionment of attorneys' fees is appropriate where some of the claims and efforts of the claimant were unsuccessful."). Being easily distinguished from time spent on other claims, Plaintiffs must present time records that permit that time to be segregated. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("applicant [for fees] ... should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims").

The failure to apportion fees is particularly egregious here because the majority of the fees on remand were incurred in litigating punitive damages. Although the parties briefed the Circuit Court on remand regarding cancellation and offset, the lion's share of the briefing concerned punitive damages because on that issue the Circuit Court was essentially starting from scratch. *See* Defendant Quicken Loans Inc.'s Opening Brief on Remand (Mar. 6, 2013) (A0000608-659) (19 of 21 pages of argument devoted to punitive damages); Plaintiffs' Brief in Support of Their Position Following Remand (Mar. 6, 2013) (A0000544-607, 2992) (17 of 26 pages of argument devoted to punitive damages).

Second, the Circuit Court erred in accepting without scrutiny Plaintiffs' supposed fees. A court's exercise of such discretion should be a thoughtful decision based on everything before it, as the dozen potentially relevant factors should confirm:

> Where attorneys' fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorneys' fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Syl. pt. 4, *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). Here, however, the court accepted essentially all of the supposed fees, without any analysis. *See* Remand Op. at 22 (A0000912) ("This Court, following Judge Recht's prior Order, accepts the billing records submitted by the Law Firm of Bordas and Bordas as being both reasonable and reliable in terms of the work performed and the time devoted to each of those tasks. This Court awards the hourly rates requested by the Plaintiffs, with slight modification . . . .").

Furthermore, if the Circuit Court had examined the supposed fees, it would have found that the documentation of hours was clearly deficient. "Where documentation of hours is inadequate, the [trial] court may reduce the award accordingly." *Hensley*, 461 U.S. at 433. In their application for fees on remand, Plaintiffs' documentation of hours has two primary flaws. First, it is admittedly based in some unspecified (but substantial) part on "reconstructed" time. In other words, records were not kept contemporaneously, but have been created from hindsight.

Second, many entries are simply far too vague to charge to anyone, be it a client or an adversary.[11]

In addition, the hourly rates approved by the Circuit Court exceeded those found reasonable by Judge Recht for similar work in the same case. Neither Plaintiffs nor the court provided any reason why counsel's time should be compensated at significantly higher rates now than in 2011. In sum, the Circuit Court conducted no review, let alone an adequate review, of attorneys' fees.

CONCLUSION

The judgment should be vacated, and the case should again be remanded for further proceedings consistent with the law, the federal and state constitutions, and this Court's original mandate.

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[11] Descriptions of inter-office conferences (for which at least a quarter-hour is always charged) often consist of no more than "Discuss with JEC" (Bordas, Jr., 01/08/13), "Meeting with JBS" (Causey, 3/14/11, 3/24/11, 4/01/11), "Meeting with JEC" (Stoneking, 3/14/11, 5/03/11, 6/07/11, 09/29/11, 10/04-06/11), and the like. Other inscrutable entries include "8 internal e-mails" (Causey, 4/21/11) and "Prepare letter" (Causey, 5/02/11). (A0000776, 780-781, 794a-795).

CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, counsel of record for Petitioner Quicken Loans Inc., hereby certify that the foregoing "Brief of Petitioner Quicken Loans Inc." and the accompanying Appendix Record were served this 21st day of October 2013, by placing true and accurate copies thereof in the United States Mail, postage prepaid and addressed as follows:

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BRIEF FILED
WITH MOTION

No. 13-0764

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO QUICKEN LOANS, INC.'S PETITION FOR APPEAL

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In November of 2012, this Honorable Court affirmed the circuit court's conclusion that Quicken Loans, Inc. ["Quicken"] committed common law fraud and employed unconscionable conduct to induce Respondents to accept an unconscionable loan. This Court specifically found that Quicken's conduct was "designed to mislead" the Respondents into a loan with "exorbitant" costs; that Quicken engaged in "opportunistic" and "distasteful" conduct; and when it comes to unconscionability, this Court concluded that "this is not a close case."

Nevertheless, on remand Quicken maintained that it did little to nothing wrong, that Ms. Jefferson received "precisely what [she] wanted", and that it deserved "no punishment" at all.[1] In doing so, Quicken asked that the "status quo" be restored by rescinding the loan, that no additional compensation be awarded, that it should not have to pay any of Respondents' attorney fees and costs, and, notwithstanding the fact that Quicken would not have to pay a single dime in compensation or attorney fees to the Respondents under its theories, that no punitive damages should be awarded. In fact, had the circuit court adopted Quicken's position it is Ms. Jefferson who would need to cut Quicken a check for more than three times her home's value.

This extreme strategy failed and reminded the circuit court of a Japanese soldier who continued to fight World War II for 28 years after it ended. This analogy is not only creative, but on point. In addition to committing common law fraud, the circuit court determined in early 2010 that Quicken violated four consumer protection statutes. Three of these violations were not appealed and are, therefore, final. The statutory unconscionability claims, along with the common law fraud claim, were finally and conclusively established in this Court's 2012 Opinion. What is more, Quicken has never appealed the circuit court's conclusion in 2010 under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) that its conduct constitutes "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil

[1] See, Quicken's Opening Brief on Remand at 1 (A614), 16 (A629), 28 (A641) & 35 (A648).

obligations affecting the rights of others," such that punitive damages are warranted. Despite the multiple findings of unlawful, fraudulent, and unconscionable conduct, Quicken presses on with its arguments here.

Accordingly, this Court's main task appears limited and clear: it should perform its own due process review primarily by applying its own prior findings to the various *Garnes* factors. In addition, the Court should reject Quicken's attempt to hoist up an ill-suited, generic civil penalty that it masquerades as a guidepost under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and look to more meaningful measures of punishment existing under state law. This required review should lead to the affirmance of the circuit court's award, once and for all.

In addition, this Court should, consistent with its 2012 Opinion, affirm the circuit court's refusal to enforce the unconscionable loan agreements while preserving Quicken's security interest. This Court should further affirm the circuit court's conclusion that the offset of compensatory damages mandated by this Court excludes attorney fees and costs, particularly where Quicken affirmatively represented in its prior appeal that it would pay Respondents' attorney fees. Finally, the Court should determine that the circuit court did not abuse its discretion in awarding additional fees and costs on remand.

STATEMENT OF THE CASE

A. Background

At the time of the loan, Lourie Brown (now Lourie Jefferson) was a 42-year old single parent, who worked as a licensed practical nurse and earned $14.36 per hour. *See*, PL Ex. 1-EE (A2085). Lourie Jefferson has three children, two of whom are minors and another, Plaintiff Monique Brown, who is a disabled adult who suffered a traumatic brain injury in 2001. *See*, Findings of Fact and Conclusions of Law entered on Feb. 25, 2010 ("2/25/10 Op.") at ¶¶ 1-2

(A129). Ms. Jefferson was unable to work for an extended period of time due to her daughter's accident, which together with the subsequent death of Ms. Jefferson's mother, Lena Brown, triggered financial hardship for the Plaintiffs. *See*, *id.* at ¶7 (A130); Vol. II at 180-181 (A1468-1469) (Jefferson). These difficult circumstances led Plaintiffs to obtain a mortgage with CitiFinancial, as well as another unsecured loan, also with CitiFinancial. These loans were refinanced multiple times. *See*, 2/25/10 Op. at ¶¶ 8-12 (A130).

B. The Loan Origination and Fraudulent Promise of Refinancing

While using an internet browser, Ms. Jefferson saw a pop-up ad offering an attractive refinance opportunity, which led to a telephone solicitation call from Quicken's loan agent, or "mortgage banker", Heidi Johnson ["Johnson"]. *See, id.* at ¶ 15-17 (A131). Quicken is a large national mortgage lender, headquartered near Detroit, Michigan. The loan process began on May 16, 2006. Later, an appraisal was ordered from former Defendant Dewey Guida and his company Appraisals Unlimited [collectively, "Guida"]. For no bona fide reason, the appraisal order form included an estimated value. 2/25/10 Op. at ¶ 50 (A136).

Quicken quoted Ms. Jefferson a higher monthly payment than she expected based on the pop-up advertisement. As a result, she became hesitant to complete the loan. 2/25/10 Op. at ¶24 (A132). Beginning on May 24, 2006, Ms. Jefferson ceased returning Quicken's calls. *See*, PL Ex. 1-QQ, Q410, 414-19 (A2110, 2124-29). "On May 26, 2006, Guida concluded that the Property had a value of $181,700, using an analysis of comparables of distinctly different properties located in neighborhoods vastly superior to the Property's neighborhood." 2/25/10 Op. at ¶ 23 (A132). On May 30, 2006, Ms. Jefferson called Quicken and stated "that she no longer want[ed] to go through with the loan." *Id.* at ¶ 25 (A132); PL Ex. 1-QQ, Q420 (A2130).

The appraisal was approved by Quicken on May 31, 2006. PL Ex. 1-QQ, Q421 (A2131). On June 1, 2006, Quicken left Ms. Jefferson a message stating that the appraisal came in where needed. *See*, PL Ex. 1-QQ, Q423 (A2133) (noting "we have appraisal done now though so maybe I can save"). Quicken representatives left several other messages for Ms. Jefferson, but she did not respond to any of them. *See*, PL Ex. 1-QQ, Q426-429 (A2136-2139). Ms. Jefferson finally spoke to Ms. Johnson on June 6, 2006. The note to the file describes lengthy persuasion employed by Quicken to get this loan "closed:"

> Client finally reached me/she was being swayed by a broker and that's why she wanted to back out/client very timid and I just had to spend a lot of time explaining to her being taken advantage of/Adding more cash out and taking up to full 80% LTV and will have closure today.

PL Ex. 1-QQ, Q431 (A2141). *See also*, PL Ex. 4, Q2623 (A2329) (in referring to this conversation, Johnson states in an e-mail, I was "*trying to save her from going to the bank.*").

In her testimony, Ms. Jefferson completed and clarified this exchange by identifying a specific promise that fueled her change of heart and agreement to this illegal loan:

> She told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got – everything started to be paid off, then I would be able to refinance my loan.

Vol. II at 195 (A1483) (Jefferson). "Lourie Jefferson understood Quicken's position to be that once her loan was in place, Quicken would be able to refinance the loan in three to four months and then she could get a cheaper rate." 2/25/10 Op. at ¶ 29 (A133). Quicken's written training materials, among other aggressive practices, encourage "forward looking statements" that push the boundaries of false promises. *See e.g.*, PL Ex. 8 at 878-80 (A2583-2585), Q916 (A2621), Q940-941 (A2645-2646), and Q971 (A2676). Specifically, Quicken suggests telling borrowers that "[y]our transaction with Quicken Loans/Rock Financial will assist you in your quest to

reestablish a solid credit rating and the ability to transition into a conventional loan in a short period of time without a prepayment penalty." *Id.* at Q879 (A2584) ("Overcoming Objections"). In addition, Quicken touted the inflated appraisal to coax Ms. Jefferson into borrowing more money than she had originally sought. *See*, Vol. II at 196 (A1484) (Jefferson).

Instead of sending someone to the closing who could explain what had become very complex terms, Quicken sent an unaffiliated notary to Plaintiffs' home to close the loan. The notary opened the large closing packet and instructed Ms. Jefferson to sign various documents, which were marked with "sign here" stickers. The closing took roughly 15 minutes. Ms. Jefferson felt rushed and the notary was unable to answer her questions about the loan documents, which included an unspecified balloon payment. *See*, *id.* at 200-202 (A1488-1490). Prior to closing, Ms. Jefferson was unaware of *any* balloon payment on the loan. At the closing, she did not understand the meaning of a balloon payment, but was not overly concerned in light of Quicken's promise to refinance within a few months. *See*, *id.* at 203-204 (A1491-1492).

Johnson made a commission on this loan of $834. Nuckolls Deposition at 43-44 (A920) (Corporate Representative for Quicken). Commissions for Quicken employees were based on the loan amount, loan type and number of loans closed per month. *See*, *id.* at 22 (A916). The more loans and the higher the loan amounts or loan volume, the higher the commission. *Id.* at 23-24 (A916). High revenue, subprime loans, like this loan, paid higher commissions than prime loans. *Id.* at 25 (A917). In addition to base commissions, loan agents earn additional sums on loans priced at a "*premium*" through discretionary "*discount*" points, which Johnson added to this loan. *See*, *infra* at 7-8. Finally, the threat of termination motivates loan agents to aggressively pursue loans. *See*, *id.* at 185-186 (A1655) ("Her responsibility was to close mortgages.").

C. A Broken Promise

In October 2006, Ms. Jefferson contacted Ms. Johnson numerous times to start the promised refinancing. However, Ms. Johnson was not responsive to Ms. Jefferson's repeated calls. 2/25/10 Op. at ¶ 37-38 (A134). "Ultimately, Quicken Loans refused to refinance the . . . loan, [which] . . . constitutes a breach by Quicken of a pivotal ingredient of the loan transaction." *Id.* at ¶ 39 (A134). At trial, Quicken admitted it never intended to keep its promise to Ms. Jefferson. *See*, Vol. IV at 29 (A1616) (Opening St.) ("Quicken . . . cannot and does not refinance in under four months.").

D. The Outrageous Terms of the Loan

1. Underwater Loan with an Adjustable Rate

On July 7, 2006, Quicken closed the loan in the amount of $144,800. Quicken made this loan despite the true market value of Plaintiffs' property being only $46,000. 2/25/10 Op. at ¶ 56 (A137). The initial annual interest rate of 9.25% was fixed for 3 years and then adjusted every six months thereafter, based on the market in London. *See*, PL Ex. 1-P (A2011-2012). The interest rate could increase to as high as 16.25%, but only decrease to 7.75%. *Id.* (A2012). The initial monthly payment was $1,144, exclusive of taxes and insurance. PL Ex. 1-P (A2012). Ms. Jefferson's previous mortgage had a 30-year fixed rate of 9.75% and a monthly payment of $578. *See*, PL Ex. 18 (A2823). None of Ms. Jefferson's other debt was secured by her home.[2]

2. The Shocking Balloon Feature

The loan contained an exotic feature known as a 40/30 balloon payment. There was no pre-closing disclosure of the balloon payment. *See*, Vol. V at 22 (A1699) (Lyon - Corporate

[2] While this loan conceivably included an *initial* monthly saving to Ms. Jefferson compared to the combined cost of her prior debts, this Court noted in its Opinion at fn. 17 that "according to Quicken's own financial expert, beginning two years and five months into the loan, Plaintiff no longer saved money . . . Furthermore, after five years . . ., Plaintiff's monthly payment would be $1,582, as compared to the combined monthly payment for her previous mortgage and other debt, which would have been $578."

Representative for Quicken); 2/25/10 Op. at ¶ 46 (A135). In fact, the loan as disclosed prior to closing *did not* have a balloon feature of any kind. The loan as disclosed fully amortized with a variable rate of 8.5% and an initial monthly payment of $799. *See*, PL Ex. 1-OO (A2110); PL Ex. 1-PP (A2111). Even at closing, the balloon feature was not fairly or lawfully disclosed.

West Virginia law requires conspicuous disclosure of balloon payments. The amount of the balloon payment and its due date must be stated specifically on the promissory note. *See*, W.Va. Code § 46A-2-105(2). It is undisputed that the promissory note that Quicken prepared contains no such disclosure. *See*, PL Ex. 1-P (A2011-2015). As a result, Ms. Jefferson was unaware of the amount of the balloon payment and its due date when the loan closed.

Importantly, this was no ordinary balloon note. Because this loan product amortizes over 40 years, it leaves the borrower with a very large balloon payment when it becomes due in 30 years. A balloon payment of $107,000 would be due *after* 360 monthly payments totaling an estimated $550,084. 2/25/10 Op. at ¶ 45 (A135). Plaintiff's expert witness, Margot Saunders, explained the 40/30 product was short-lived, rare, and considered dangerous. She further opined that it was an outrageous product with a huge finance charge. *See*, Vol. II at 113 (A1401). Here, Ms. Jefferson's fate and the fate of her disabled daughter were sealed at the loan closing. *After paying more than half of a million dollars on the loan, Ms. Jefferson, then a 72 year-old woman, and Ms. Brown, then a disabled 57 year-old, would have to come up with another $107,000 or face foreclosure.* Most egregiously, because the loan exceeded the fair market value of their home by nearly $100,000, Plaintiffs could not escape the balloon payment by refinancing.

3. Excessive Points and Closing Costs

Quicken charged Ms. Jefferson four points, or 4% of the loan, for what it termed a "loan discount." *See*, PL Ex. 1-L (A1994). Discount points are intended to be in exchange for a

reduction of the interest rate. Vol. I at 96 (A1081) (Saunders). The maximum number of loan discount points available for this loan was 2.5. Nevertheless, Quicken represented to Ms. Jefferson that she was buying her interest rate down with the purchase of four discount points. Unbeknownst to Ms. Jefferson, 1.5 of those points, or $2,100, resulted in *no benefit* to her. *See*, 2/25/10 Op. at ¶¶ 41-43 (A135); Banfield Deposition at 51-52 (A973).

Quicken's written policies expressly gave its loan agents discretion to overcharge borrowers in this fashion, and termed such an overcharge a "premium."

> (i) General Rule – As a general rule, Mortgage Bankers are required to adhere to Quicken Loans published daily rates in quoting rates, points, fees and programs to prospective clients.
>
> (ii) Premiums – Mortgage Bankers shall have the discretion to charge a rate/point/fee structure that exceeds the daily price sheet on certain products, provided that the price charged does not exceed the daily price sheet price by more than two points. The additional revenue resulting from the Mortgage Banker's proper exercise of such discretion is considered the "premium" for purposes of Section I B above.

PL Ex. 9, Q1010 (A2691). This is all by design. Mrs. Jefferson paid $2,100 for nothing. *See*, Vol. V at 139-140 (A1728) (Banfield). For these reasons and others, the circuit court determined the total closing costs of $8,889 to be excessive. 2/25/10 Op. at 17 (A143).

E. Quicken's Business Model and Its Feverish Attempts to Sell This Loan

Quicken's goal is to sell 100% of its loans and to avoid "get[ting] stuck with loans." *See*, Banfield Deposition at 16-17 (A969-970) "Quicken has the ability to do what's called interim servicing . . . But we do not have a strategy of holding services for the long term." *Id.* at 19 (A970). Quicken creates a pool of loans and sells the pool on the secondary market. *See*, *id.* at 20-21 (A970-971). The larger the loan - the more Quicken makes in both points and sales. *See*, Vol. I at 105-07 (1090-92), 187-89 (A1172-74) (Saunders). Beginning in August 2006, Quicken attempted but failed to sell this loan numerous times. *See*, 2/25/10 Op. at ¶¶ 60-61 (A141).

On or about February 21, 2007, Quicken obtained a second appraisal from a different licensed appraiser, Michael Doyle, in anticipation of foreclosure. Therein, Doyle opined that the Property had a value of only $56,000 – over $125,000 less than Guida's value. *See*, Vol. I at 149-150 (A1134-1135) (Saunders); PL Ex. 22 (A2859); PL Ex. 23, Q643 (A2883). Nevertheless, Quicken's efforts to sell the loan continued into April of 2007. *See*, Vol. V at 111 (A1721) (Banfield). Thus, despite knowing its appraisal was inflated, Quicken still attempted to sell the $144,800 loan on the secondary market. *See*, Vol. V at 202 (A1744) (Borelli).

F. Foreclosure and Procedural History through Trial

Within months of closing the loan, in January 2007, Ms. Jefferson underwent surgery. Because of a hemorrhage, she had to undergo a second surgery on an emergency basis. Ms. Jefferson was required to be off work for at least a few months. She advised Quicken of the same and asked for assistance with her payments. Several of her pleas for help over the next six months were in writing. *See*, PL Exs. 27 (A2896), 29 (A2899) & 32 (A2904). Although Ms. Jefferson was able to make payments in January and February, Quicken was unwilling to work with Ms. Jefferson in any manner. *See*, Vol. II at 210-214 (A1498-1502) (Jefferson); Vol. IV at 129-130 (A1641) (Nuckolls) (Quicken categorically did not make discretionary loan modifications); PL Ex. 28 (A2897). On July 27, 2007, Quicken issued a notice of acceleration of the balance through the Trustee named in the Deed of Trust. PL Ex. 33 (A2905).

In August 2007, Plaintiffs provided statutory notice of a claim and afforded Quicken a right to cure under W.Va. Code § 46A-6-106(b). *See*, PL Exs. 34 (A2907) & 35 (2909). No cure offer was made; instead, a Notice of Foreclosure Sale was issued. *See*, PL Ex. 38 (A2914). Plaintiffs were forced to obtain injunctive relief from the circuit court to avoid the immediate loss of their home. *See*, PL Application for Preliminary Injunction (Feb 1. 2008) (A32). Prior to

judgment, Plaintiffs paid without delay $578 per month to Quicken. *See*, Vol. IV at 84-85 (A1629-1630) (Winfree); PL Exs. 39 (A2915-2933) & 53 (A2989). During litigation, Quicken declined to make a single offer of settlement before being found liable. *See*, Phase II at 171-172 (A2982) (Nuckolls); PL Post Trial Brief Regarding Punitive Damages at 6 (A171).

On February 25, 2010, the circuit court entered its 26 page Memorandum of Opinion. It found against Quicken on multiple counts, including: common law fraud, unconscionability (both unconscionable inducement and unconscionable contract under W.Va. Code § 46A-2-121), unfair methods of competition and unfair or deceptive acts or practices under § 46A-6-104, illegal mortgage in excess of fair market value under § 31-17-8(m)(8), and illegal balloon payment under § 46A-2-105(2). As damages, the court ordered $17,476.72 in restitution of payments, cancelled the loan, and awarded attorney fees and costs under both § 46A-5-104 and § 31-17-17(c). Finally, the court concluded that the cumulative effect of Quicken's misconduct warranted "a" punitive damage award under *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (affirming *Mayer*, 40 W.Va. 246, 22 S.E. 58).

On September 1, 2010, the circuit court held the punitive phase, or Phase II of the trial, under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Thereafter, the parties submitted briefs arguing the *Garnes* factors. On February 17, 2011, the circuit court issued its award for punitive damages in the amount of $2,168,868.75 and attorney fees and costs in the amount of $596,199.89. Judgment was entered accordingly.

G. Quicken Loans' First Appeal

In its appeal, Quicken asserted five assignments of error. Addressing the first assignment, this Court held that "there is no merit to Quicken's contention" that the loan was not induced by unconscionable conduct and, moreover, found that "[t]his is not a close case" in

upholding the circuit court's conclusions that the entire loan agreement was unconscionable. *Quicken Loans v. Brown*, 230 W.Va. 306, 737 S.E.2d 640, 658-59 (2012).

Quicken also appealed each of the circuit court's three findings that Quicken engaged in common law fraud. This Court affirmed the circuit court's findings of clear and convincing evidence of fraud with respect to the concealment of the enormous balloon payment and the false promise of refinancing. However, this Court found insufficient evidence of reliance on Quicken's misrepresentation of the "discounted" interest rate and reversed on that point. Nonetheless, it characterized Quicken's conduct as "distasteful and opportunistic." *Id.* at 656.

For its third assignment of error, Quicken contested the circuit court's authority to cancel the loan. This Court agreed with Quicken in part and reversed the remedy of cancellation, but specifically preserved the circuit court's "authority to refuse to enforce the Note and Deed of Trust . . . pursuant to . . . West Virginia Code § 46A-2-121" on remand. *Id.* at 661.

As regards to punitive damages, Quicken first argued that the circuit court erred by failing to apply the required factors under *Garnes*. This Court remanded for additional findings. Quicken further argued that the cancelation of the loan and the award of attorney fees could not be considered compensatory and therefore could not be included in the ratio analysis under *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 187 W.Va. 457 (1992). The Court declined to address the cancelation remedy in light of its partial reversal. However, with respect to attorney fees and costs, the Court adopted a new syllabus point. "Attorneys fees and costs awarded under West Virginia Code § 46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act shall be included in the compensatory to punitive damages ratio in cases where punitive damages are available." *Quicken Loans*, at *syl. pt.* 11.

In its last assignment of error, Quicken contended that it "is entitled as a matter of law to an offset of compensatory damages and the loan cancellation." Brief of Petitioner Quicken Loans, 09/06/11, at 39 (A402). Importantly, Quicken did not seek an offset of the attorney fee award. This Court found only that Quicken was entitled to offset compensatory damages.

H. Proceedings on Remand

On remand, the Honorable David Sims, who succeeded retired Circuit Judge Arthur Recht, entered a briefing schedule at the request of the parties. *See*, 1/28/2013 Stipulation and Agreed Order (A551). On April 9, 2013, Judge Sims heard argument on the pending issues, at which time the parties, through counsel, agreed that under this Court's mandate Judge Sims should enter his own punitive damage award, as opposed to merely providing support for Judge Recht's award. 4/9/2013 Status Hearing at 16-18 (A731-733).

Judge Sims, after having studied the record, entered his 24-page memorandum opinion and order on June 18, 2013 ["Remand Op."] (A891), which included a punitive damage award of $3,500,000 and the required findings of fact and conclusions of law under *Garnes*. The matter is therefore ripe for this Court to conduct its own due process review of the punitive damage award. Unfortunately, Quicken attempts to divert this Court's attention from genuine issues by focusing on some of the strong and, perhaps, unconventional language utilized by the circuit court. While Judge Sims took the liberty of airing his discontent with the positions Quicken had taken on remand, his Order remains well-reasoned and well-supported by the record.

With respect to the remedy under W.Va. Code § 46A-2-121, the circuit court exercised its authority to refuse to enforce the loan. The circuit court, however, did not cancel the loan outright as Quicken protests. Instead, the deed of trust remains a valid lien requiring the Plaintiffs to satisfy up to the principal balance before they transfer *any* interest in the secured

property. Thus, in keeping with this Court's Opinion, Quicken still has its security interest intact; however, because Quicken cannot enforce the note or deed of trust, payment against the principal balance will occur on Ms. Jefferson's timetable, not Quicken's.

Turning to the issue of offset, the circuit court allowed an offset against compensatory damages. The issue in this appeal is whether Quicken is further entitled to offset the attorney fee award. On public policy grounds, the circuit court rejected Quicken's newly devised request to fully offset the attorney fee and cost award.

Finally, the circuit court properly allowed a supplemental award of attorney fees and costs to account for the time and expense incurred by Plaintiffs' counsel in defending post-trial motions, defending the first appeal, and litigating the remaining issues on remand.

SUMMARY OF THE ARGUMENT

Quicken seeks a due process review of the punitive damages award under the three guideposts of *Gore*, 517 U.S. 559: reprehensibility, disparity between award and harm, and disparity between award and civil or criminal penalties. With regard to reprehensibility, the circumstances here warrant a substantial award of punitive damages. Quicken, through its ultra-aggressive policies, facilitated and encouraged the rank and file to engage in intentional malice, trickery and deceit. The circuit court correctly found that "[t]here is a recklessness and inherent greed in Quicken Loans' conduct. Quicken Loans has shown no concern for any of the consequences of its conduct. Quicken Loans' only motive in procuring Plaintiffs' mortgage loan was to turn an immediate profit and then quickly unload . . . it." Remand Op. at 9-10 (A899-900). As for the disparity between the award and harm or potential harm, there is practically none, as the circuit court appropriately found the potential harm attributable to Quicken to be both "enormous" and "incalculable." And, finally, the anchor of Quicken's argument proves to

be an inapplicable, meaningless civil penalty that is overcome by the wealth of serious civil and criminal penalties applicable under West Virginia law to the exact type of fraud at issue here.

Whether due process is framed around *Gore* or *Garnes*, the circuit court correctly applied all of the applicable factors. What is left is Quicken's thinly spread attempt at manufacturing constitutional issues that do not exist. Accordingly, the circuit court committed no error and the punitive damages award should be affirmed.

Relying on little more than out-of-place buzz-words, such as "forfeiture" and "status quo", Quicken criticizes the circuit court for refusing to enforce the unconscionable loan agreement. However, the circuit court was acting under the express authority of this Court's Opinion and W.Va. Code § 46A-2-121. The circuit court did not cancel the loan outright, but instead properly preserved Quicken's security interest. The circuit court's remedy fairly balances the intent of the Consumer Credit and Protection Act ["CCPA"], not to enforce unconscionable consumer agreements, with the preference the CCPA gives to secured loans.

In its 2012 Opinion, this Court did not address whether Quicken could offset the attorney fee and cost award against the prior settlement. Naturally, there was no reason to address the issue in light of the fact that when this case was first appealed "Quicken Loans [was] already paying Plaintiffs' attorney's fees." Brief of Petitioner Quicken Loans Inc., 09/06/11, at 32 (A395). On remand, Quicken's "forward-looking statement" proved false. Now, Plaintiffs are subject to yet another appeal having sought only a single recovery of their divisible fees that remain unpaid.

Finally, the circuit court did not abuse its discretion in making a supplemental award of attorney fees and costs on remand.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents respectfully submit that oral argument is unnecessary in this matter. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decision process would not be significantly aided by oral argument. The Court has heard oral argument previously and has already decided the facts that it will undoubtedly apply to the *Garnes* factors. There is no substantial question of law remaining and no prejudicial error was made by the circuit court.

ARGUMENT

I. The Punitive Damages Award Was Well-Supported And Satisfied Due Process

This Court's primary duty in this appeal is to conduct a *de novo* review of the circuit court's punitive damages award to assure that Quicken was afforded due process. *See*, *syl. pt.* 16, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009).[3] In conducting a *Garnes* analysis, it is important to keep in mind "[t]he *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards." *TXO*, 187 W.Va. at 474, 419 S.E.2d at 887. The mere fact that a mitigating factor is present does not necessitate a reduction in the amount of punitive damages. *Perrine*, 225 W.Va. at 557, 694 S.E. 2d. at 890. On appeal, "[p]etitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not

[3] The general standard for bench trials is also applicable to the extent that Quicken's alleged errors require consideration of the sufficiency of the evidence. *Cf.*, *Perrine v. E.I. Dupont De Nemours & Co.*, 225 W.Va. 482, 549, 694 S.E. 2d. 815, 882 (2010). "In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard . . ." *Syl. pt.* 1, *Public Citizen, Inc. v. First National Bank*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

specifically addressed in the petition will be deemed waived as a matter of state law." *Syl. pt.* 5, *Garnes*, 186 W.Va. 656, 413 S.E.2d 897.[4]

Curiously, Quicken largely chooses to bypass *Garnes* and instead arranges its argument around the guideposts of *Gore*, 517 U.S. 559. The factors in determining reprehensibility, the first and most crucial guidepost under *Gore*, include

> whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm v. Campbell, 538 U.S. 408, 419 (2003). The remaining two guideposts address the disparity between the punitive damages award and the actual or potential harm inflicted by the defendant and a comparison of the award to civil or criminal penalties that could be imposed for comparable misconduct.

A. Quicken's conduct is reprehensible.[5]

This Court has essentially already concluded that this loan was no "mere accident" and instead was the product of fraud, which is akin to "malice, trickery, or deceit." Here, Quicken

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[4] Here, Quicken waived any error in regards to, at a minimum, the circuit court's use of profit, the parties' litigation costs, any criminal sanction, any other civil actions, and the catch all, additional relevant evidence. In the pre-argument sections of its brief, Quicken briefly mentions the factors regarding profit and Plaintiffs' litigation costs but never addresses these factors with "particularity." Even if not waived, the circuit court's analysis on these factors was appropriate. The circuit court did not attempt to quantify Quicken's profit or apply any such figure. The circuit court first noted the potential profit from the loan had all the payments been made; second, it noted that only $17,000 in payments were actually made, which Judge Recht ordered to be returned; and, finally, it concluded that punitive damages should be in excess of any profit. With respect to Plaintiffs' litigation costs, the circuit noted that the case was unattractive, complex, aggressively defended and very expensive for the Plaintiffs. Quicken argues here that it has been ordered to pay Plaintiffs' litigation costs. But to this point, Quicken has paid nothing. Plaintiffs have received only a fraction of their litigation costs from a separate defendant, Guida, and the amount received was largely attributable to work for which Quicken was not ordered to pay.

[5] Respondents here have responded to Quicken's arguments in the order Quicken has raised them. In doing so, both federal and state standards are addressed as necessary. A comprehensive, step by step review of the *Garnes* factors may be found at Plaintiffs' Brief in Support of Their Position Following Remand at 21-33 (A577-589).

intentionally induced the Plaintiffs into accepting an unconscionable loan that featured unfathomable terms by making fraudulent representations and engaging in other fraudulent conduct. In reality, Quicken's sales tactics were nothing short of a con, featuring a game of bait-and-switch of loan terms that culminated in the introduction of an enormous balloon payment into the loan at closing.

In its Opinion, this Court stated that "[c]oncealing such an enormous balloon payment from Plaintiff was ***designed to mislead her and to induce her*** into entering into the loan and, in fact, that is precisely what occurred." *Quicken Loans*, 737 S.E.2d at 654 (emphasis supplied). This loan was no accident. Quicken's actions were *designed* to mislead and intended to *induce* the Plaintiffs to enter into an absurd loan that would cost them $349,000 more than their prior loans combined, including a final payment of $107,015 – none of which they could afford.

Certainly, this Court did not use the word "designed" loosely, as the opinion included pages of detail that demonstrated the intentional nature by which the enormous balloon payment was concealed. The facts noted by this Court include: (1) the only loan that *was* disclosed to the Plaintiffs prior to closing did not include a balloon, (2) Quicken did not send out revised disclosures per industry standards in advance of closing, (3) the balloon payment was not conspicuously disclosed on the Note as required by West Virginia law at closing, (4) "nowhere in the closing documents signed by Plaintiff at the July 7, 2006 closing does the balloon payment amount of $107,015.71 appear", (5) Jefferson would have had to sort through legal jargon before performing an actuarial calculation to arrive at the amount of the balloon at closing, and (6) Quicken appointed an uninformed notary who could not answer any questions while conducting a 15 minute closing. *See, id.* at 653-654.[6]

[6] Ignoring all of the above facts, in footnote 4 of its brief, Quicken grabs onto footnote 27 of this Court's Opinion and argues that the Court "relied heavily" on the absence of the Truth-in-Lending

When affirming liability for common law fraud, this Court further found that "Quicken's fraudulent misrepresentation to Plaintiff that it would refinance the loan in three to four months was clearly material because, absent that promise, Plaintiff would not have otherwise entered into the loan." *Id.* at 655.[7] Of course, when Ms. Jefferson called to obtain the promised refinancing, Quicken turned its back on her. Likewise, this Court found that Quicken harmed the Plaintiff through its program to sell discount points that in fact do not reduce interest rates. Here, the Court characterized Quicken's actions as "distasteful" and "opportunistic." *Id.* at 656. Because Quicken's many tactics, including its phony discount points, were motivating or facilitating factors behind one common fraudulent scheme, it is appropriate to consider them collectively, as opposed to engaging in the unsupported, illogical and vacuum-based analysis that Quicken urges. Even "lawful out-of-state conduct" may be used to show reprehensibility where there is a "nexus" between the conduct and the harm suffered by the plaintiff. *State Farm*, 538 U.S. at 422. Certainly then, transaction-specific, related conduct can be considered for purposes of determining reprehensibility.

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disclosure (which non-conspicuously contains the final payment in small print) when finding fraudulent concealment. However, Quicken leaves out the following language from footnote 27, "Quicken does not argue on appeal that this document disclosed to Plaintiff prior to or at the July 7, 2006, closing that the amount of the balloon payment was $107,015.71." Nor did Quicken ever make this argument at trial or at any point in the record before remand. Not surprisingly, there is no testimony addressing Plaintiffs' Exhibit 5 in this regard. For these reasons, no weight can be given to this argument. But even now, Quicken is not coming clean. Consistent with Quicken's argument at trial, the circuit court found Quicken delivered "two" packages of loan documents to Ms. Jefferson. 2/25/10 Op. at ¶¶ 34-35 (A134). What Quicken really means (but is unwilling to say) is that the two packages were not exactly identical: the execution copy was missing the Truth-in-Lending disclosure but the unsigned copy that the borrower retains after closing (Pl. Ex. 5) (A2437-2519), included the disclosure. Excluding this disclosure from the execution copy is entirely consistent with Quicken's fraudulent scheme. Note also that Plaintiffs' Exhibit 5 is Bate stamped *out of order*. The first page of the loan package can be found at B5076 (A2512).

[7] Judge Copenhaver recently found similar evidence of fraud against Quicken. *See*, *Bishop v. Quicken Loans*, 2011 WL 1321360, *9 (S.D. W.Va.) (Denying summary judgment, the court found "[P]laintiffs have presented sufficient evidence that Quicken Loans materially misrepresented that it would refinance the December 2006 note to a fixed-rate loan before the adjustable interest rate could increase.").

In its brief at pages 3 and 13, Quicken again casts its behavior as the "isolated conduct" of "a single low level employee." This is simply not the case. Quicken was both aware of and encouraged its employees' deceitful behavior, behavior that was causing or was likely to cause harm to its customers, through its own policies.[8] For example, Quicken openly encouraged its employees to make "forward looking statements" or "hypotheticals" (perhaps better characterized as "lies") regarding refinancing. *See*, Phase II Transcript at 97-105 (A2964-66) (Saunders discussing Quicken's training materials). Quicken's "sales-isms" include the recommendation to "press the bruise" and, thereby, present the loan Quicken is pushing as the prospective borrower's only option given a past financial blemish or other bruising event that has followed the borrower around. *See*, Vol. IV at 162-163 (A1649) (Nuckolls). These training materials further include scripts on how to "overcome a prospective borrower's objections to a loan." *Quicken Loans*, at fn. 6.

During discovery and at Phase I of the trial, Quicken approved of its loan agents making "forward looking statements." *See*, Lyon Deposition at 102-03, 109 (A947, 949). It was not until the punitive damage phase that Quicken finally condemned these policies, thereby conceding their impact.

> Q. Since 2006, has Quicken Loans done anything to ensure these types of promises are not made again?
> A. Yes.
> Q. What is that?
> A. We don't train our mortgage bankers to make these forward looking statements...*so we ensure this won't happen again.*

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[8] Respondents' discussion of Quicken's policies and procedures is included to rebut Quicken's argument that its actions were not as deliberate, culpable or reprehensible as the circuit court found, because its misconduct was purportedly isolated to a single, low level employee. Likewise, these facts bear on the issue of whether Quicken was aware its actions were causing or were likely to cause harm under *Garnes*. However, Respondents are not advocating that the Court should directly *punish* Quicken for harm that its policies and procedures may have caused others, or consider for any purpose the application of those policies outside of West Virginia.

Phase II at 148 (A2976) (Nuckolls) (emphasis supplied). The purported decision to rein in Quicken's training tactics was not made until 2010, after the underlying verdict.[9]

Similarly, it is Quicken's policy to engage in "opportunistic" pricing. Quicken encourages its loan agents to charge surplus "discount points" to borrowers without providing a corresponding reduction in the interest rate. As this Court noted, Quicken is not only aware that its employees engage in this "distasteful" conduct, but it also incentivizes such conduct through direct profit sharing. *Quicken Loans*, 737 S.E.2d at 651. In fact, as the circuit court noted, Quicken's Vice President of Mortgage Operations *signed* the settlement statement that misrepresents the loan discount points as 4 instead of 2.5, thereby indicating his knowledge of and consent to the practice. Remand Op. at fn. 5 (A900); PL Ex. 1-L (A1994).

Additionally, Quicken's policies with respect to disclosure of loan terms were inept. *See*, *id.* at 650, fn.18 & 653. The failure to assure accurate pre-closing disclosures is compounded by the fact that Quicken's policy is to send non-affiliated notaries who know nothing about the loans, rather than knowledgeable employees or lawyers to conduct loan closings. *See*, *id.* at 650, 654. This, together with the "sign here" stickers that Quicken provides, is intended to result in a quick, uninformative closing, which is unexpected and simply unfair to West Virginia consumers.

Likewise, it was Quicken's management that implemented the rare and dangerous "40/30" balloon loan product that was in and of itself unconscionable. *See*, *id.* at 650, 659. The individual loan agents were directly incentivized to sell these deceptive products, as their

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[9] The fact that Quicken purportedly changed this offensive policy post trial should do little to mitigate the punitive damage award. *See*, *Vandevender v. Sheetz*, 200 W.Va. 591, 604, 490 S.E.2d 678, 691 (1997) (in upholding a multi-million dollar award with a 15-1 punitive to compensatory ratio in an employment case, this Court stated "an appropriately sized punitive damages award may be necessary to ensure against repetition of both the conduct and the policies employed by Sheetz").

compensation was tied to the number, types and amounts of loans that they closed. Subprime loans resulted in the biggest reward for Quicken's loan agents. *Id.* at fn. 13.

Furthermore, Quicken's attempt to put this case squarely on Heidi Johnson is contradicted by its own testimony at Phase 1 of the trial, where it attempted to *minimize* her role in the loan process, as well as an incriminating note that she had written indicating that Quicken may have intentionally discarded a prior appraisal that was insufficient to make this loan in favor of the subsequent Guida appraisal.

> This is the second time I have updated this loan from suspense status/. . . *first suspense was for low appraisal issues/director told me I was okay for the first one* and am following up for the second suspense/

PL Ex. 1-QQ, Q438 (A2148) (emphasis supplied). Now with the issues surrounding this note behind it, Quicken has come full circle: instead of minimizing Johnson's capabilities, it attempts to cast her as the czar of fraud. In reality, Johnson was only doing what was she was trained to do by making the critical false promise and failing to mention the enormous balloon payment.[10] Moreover, she was doing what she was *encouraged* to do by saying what was necessary to "close the mortgage" and collect her share of the take. However, she was by no means calling the shots. Johnson did not author Quicken's training manuals, nor did she devise Quicken's compensation program. Instead, she simply did what was expected of her to keep her job.

Johnson was far from the only employee involved in this fraud. Quicken's Vice President of Mortgage Operations confirmed at trial that there were *over 20 other team members* involved in the transaction, including those responsible for preparing pre-closing disclosures;

[10] This is certainly not the first time that Quicken's sales practices have been criticized in a judicial proceeding. *Cf.*, *Henry v. Quicken Loans*, 2009 WL 3270768, *7 (E.D. Mich.)(Loan agents, such as Johnson, are told to control the release of information given to prospective clients, "giving only small nuggets of information if the client is PUSHING for answers" and to create a sense of "urgency" in their customers); *id.* at **3-9 (discussing generally Quicken's practices with respect to loan agents, including: extensive training, close supervision, sales call quotas, high-pressure work environment, the "sales process" and hard sale tactics).

reviewing the final terms of the loan with Ms. Jefferson before closing; underwriting the loan; preparing the closing packet, including the Note without the required balloon disclosure; exorbitantly pricing the loan; and selling the loan despite its obvious deficiencies. *See*, Vol. IV at 215 (A1662) & 244 (A1669) (Lyon); Vol. V at 35-36 (A1702), 73-74 (A1712) (Lyon). In sum, Quicken's reprehensible conduct was by no means isolated to Ms. Johnson's cubicle.

Another *Gore* factor, "financial vulnerability" is addressed in this Court's prior Opinion.

> As set forth above, in determining unconscionability, this Court "must focus on the relative positions of the parties, the adequacy of the bargaining positions, the meaningful alternatives available to the Plaintiff, and the 'existence of unfair terms in the contract.'" *Arnold*, at syl. pt. 4. *This is not a close case. Plaintiff was a single mother to three children who earned $14.36 an hour and who had a well-documented poor credit history. She was not a sophisticated borrower. Quicken's own records describe her as "timid," "fragile" and needing to be handled with "kid gloves."* When Plaintiff declined the original $112,000 loan because the payments were too high, Quicken continued to pursue her. It tried to contact her numerous times especially after Mr. Guida's appraisal came in at almost four times the actual fair market value of the property.

Quicken Loans, 737 S.E.2d at 658-59 (emphasis supplied). Notwithstanding Ms. Jefferson's substantial efforts to walk away from this deal, Quicken's sophisticated and deceptive sales tactics and lending practices were more than enough to trap the "fragile" and "timid" Ms. Jefferson. Furthermore, Plaintiff Monique Brown is disabled from a traumatic brain injury and, thus, even more vulnerable.

A *Garnes* factor not expressly covered by *Gore*, the attempt to conceal or cover up actions, is similarly evident. Quicken not only concealed the actual loan terms from Ms. Jefferson, as discussed above, but also focused its efforts following the uninformative closing on selling the loan on the secondary market to an unsuspecting investor. Although Quicken failed to sell this loan, its intent to "pass the buck" was made evident by its later, continuing attempts to dump the loan on the secondary market even *after* it obtained a legitimate appraisal.

Finally, as more fully discussed below, the harm or potential harm here, while not physical, was personal and beyond pure economic harm. Since the tortious conduct of Quicken jeopardized the Plaintiffs' family home, their "health or safety" was also implicated.

B. The punitive damages award bears a reasonable relationship to the harm or potential harm resulting from Quicken's conduct.

Due to Quicken's fraudulent conduct, the Plaintiffs were saddled with a mortgage that required 360 monthly payments ranging from $1,144 to $1,582 and totaling $550,084, payments which unimaginably amounted to only a marginal decrease in loan principal. "Plaintiff, who, at all times relevant, earned $14.36 per hour as a licensed practical nurse, was [then] required to make a single balloon payment of $107,015.71 to avoid foreclosure." *Quicken Loans,* at fn. 19. Thus, the total cost of the loan was a whopping $657,099, all in order to repay a loan of $144,800. The total finance charge was $520,065.61. The circuit court on remand viewed the terms of this loan as "egregious", "despicable" and "borderline criminal." It found "the nature of the likely financial harm here [to be] enormous." Remand Op. at 8 (A898).

This Court has, in essence, already answered the question of whether this loan was financially harmful to the Plaintiffs in its analysis of substantive unconscionability:

> Furthermore, as previously established, the loan contained a $107,015.71 balloon payment (of which Plaintiff was not aware prior to closing). The *total cost of the loan was exorbitant,* costing *Plaintiff an additional $349,000 in monthly payments as compared to her prior mortgage and debts.* From this and all of the evidence presented at trial, we conclude that the circuit court correctly found that, given the particular facts involved in this case, *the terms of the loan described above and the loan product, in and of itself, were unconscionable.*

Quicken Loans, 737 S.E.2d at 659 (emphasis supplied). The finance charge for an illegitimate, illegal and unconscionable loan is a reasonable measure of the financial harm. *See*, *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 958 (Or. 2007) ("the appropriate figure for potential damages is $326,751.57, the amount of interest [the lender] would have earned over the

life of the loan."). Quicken argues that the finance charge should not be considered harm or potential harm, because it "represents the legitimate price of borrowing money." However, it overlooks a number of conclusive findings from this Court, as well as the circuit court, including that "the total cost of the loan was exorbitant"; "the terms of the loan . . . and the loan product, in and of itself [particularly its cost structure], were unconscionable"; and, indeed, the interest rate was unfair, deceptive and *unconscionably high*, inasmuch as the interest rate was not reduced consistent with Ms. Jefferson's payment for discount points. *See*, 2/25/10 Op. at 17 (A143), 20 (A146). Alternatively, the $349,000 increase in total monthly payments as found by this Court is a fair measure of financial harm.

On remand, Judge Sims repeated Judge Recht's early finding that Quicken unnecessarily put "Plaintiffs' home at risk" by increasing Ms. Jefferson's "secured monthly debt obligation from $578 to $1,114." Remand Op. at 9 (A899). Indeed, Ms. Jefferson could not possibly keep up the monthly payments for long given her meager income, but she went forward with the loan because Quicken promised her refinancing at better terms in three to four months. *See*, *Quicken Loans,* 737 S.E.2d at 649. After Quicken reneged on its promise, foreclosure became inevitable. Had the circuit court not intervened, foreclosure is exactly what would have happened, causing irreparable harm to the Plaintiffs.[11] *See e.g.*, *Gonzalez v. Wells Fargo Bank, No.*, 2009 WL 3572118, *3 (N.D. Cal.) ("The possible irreparable harm that [plaintiff] would suffer if his home

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[11] Because Quicken views the harm it caused solely in terms of equity, it is worth noting that yes (unbeknownst to them) Plaintiffs were underwater prior to this loan, but Quicken took them from treading water with negative $21,000 in equity to drowning at sea with negative $98,800 in equity. Furthermore, Quicken's prediction that Ms. Jefferson may have defaulted on her preexisting loans in footnote 5 of its brief ignores the fundamental distinction between secured and unsecured debt. Ms. Jefferson may have had to deal with her unsecured debts through bankruptcy or otherwise, but any such default would not have impacted her home ownership. The family home was safe with the manageable $578 fixed mortgage payment.

is sold at foreclosure is obviously high."); *Brown v. Artery Organization, Inc.*, 691 F.Supp. 1459, 1461 (D.D.C., 1987) ("Wrongful eviction, as a matter of law, constitutes irreparable injury.").[12]

Accordingly, the circuit court correctly found that the "likely and actual harm in this case goes beyond financial harm. The fear and stress of being unable to manage a mortgage loan and the looming threat of losing one's home, can only cause incalculable psychological harm and mental distress." Remand Op. at 9 (A899). Finally, as discussed *infra* at 34-35, the attorney fees and costs incurred fending off foreclosure and pursuing consumer rights should be considered in the reasonable relationship analysis.

C. The civil penalty Quicken references is meaningless.

As part of both its first and sixth assignments of error, Quicken makes an argument based on the third guidepost of *Gore*, 517 US 559, which guidepost was not mentioned in this Court's mandate because it was raised for the first time on remand. According to Quicken, the Court should approve only a meager award of punitive damages, despite the intentional, reprehensible nature of its conduct, because the civil penalty provided for under W.Va. Code §46A-5-101 is only $1,000 before adjusting for inflation.[13]

In an effort to deflect attention from the damning effects of the first and most important *Gore* factor, 517 U.S. at 575, Quicken throws a spotlight on the third. In doing so, Quicken ignores the fact that the third guidepost is rarely helpful and, indeed, is often omitted from the

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[12] The harm here was not solely potential. *See*, Vol. II at 210-215 (A1498-1503) & 239-241 (A1527-1529) (Jefferson) (describing actual emotional harm from threat of foreclosure). To this end, there is overwhelming precedent for considering uncompensated or potential harm in awarding punitive damages. *See, e.g.*, *TXO Production Corp. v. Alliance Resources Corp.* 509 U.S. 443 (U.S. W.Va., 1993) ("It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded . . .).

[13] Certainly, it is worth noting that the circuit court has already determined that this civil penalty provision does not even apply to this case. 2/25/10 Op. at 18, fn. 5 (A144), which determination is the *law of the case* having not been previously appealed by either party.

due process analysis.[14] Here, the penalty under § 46A-5-101 is not tailored by the legislature to address common law fraud, but applies broadly for most any violation of the Consumer Credit and Protection Act ("the CCPA"), however minor or technical that violation may be.[15] In *Perrine,* this Court found that the civil penalties cited by the defendant did not "set the proper measuring tool." 225 W.Va. at 562, 694 S.E.2d at 895. The same is true here.

This Court recently examined this same civil penalty provision in *Vanderbilt Mortgage & Finance, Inc., v. Cole,* 230 W.Va. 505, 740 S.E.2d 562 (2013). In *Cole*, Vanderbilt properly foreclosed on the homeowner, Cole, and filed a wrongful detainer action against her to recover the property. Cole counterclaimed, alleging violations of the unfair debt collection provisions of the CCPA. The circuit court directed a verdict in favor of Vanderbilt on the unlawful detainer action. However, the jury found 13 violations of the CCPA, including violations for insulting language in a debt collection call, excessive calls, unnecessarily publicizing the debt to a relative and failing to timely provide an account statement. The jury awarded no actual damages; however, the circuit court awarded various civil penalties for each violation.

[14] For instance, in *BMW of North America v. Gore*, 701 So.2d 507, 514 (Ala. 1997), the Alabama Supreme Court concluded upon remand that "[b]ecause the legislature has set the statutory penalty for deceitful conduct at such a low level [i.e., "a meager $2,000"], there is little basis for comparing it with any meaningful punitive damages award." Similarly, the Utah Supreme Court upon remand in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419-20 (Utah), *cert. denied*, 543 U.S. 874 (2004) approved a $9,000,000 punitive award where the civil fine was only $10,000 (900-1 ratio).

There is no clear guidance from the Supreme Court on how to apply this guidepost, which itself blessed a 100-1 ratio in *State Farm,* and as a result federal circuit courts of appeal often give the third guidepost little to no weight. *See e.g., Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004) (following its trend not to quantify legislative penalties and/or discuss them at all); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3rd Cir. 1999)("We agree with the Tenth Circuit's observation that 'a violation of common law tort duties [may] not lend [itself] to a comparison with statutory penalties.'").

[15] The CCPA has no express statutory fraud provision. However, this Court has said fraud is akin to inducement by unconscionable conduct under § 46A-2-121(1)(a). *See e.g., One Valley Bank v. Bolen,* 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) (§ 46A-2-121 "expressly deals with conduct that is 'unconscionable' which we have equated with 'fraudulent conduct.'"). While unconscionable conduct in the CCPA is similar to common law fraud in many respects, said violation does not necessarily require all of the elements of common law fraud (*i.e.*, materiality, justifiable reliance and damages) and certainly need not be proved by clear and convincing evidence.

In affirming the circuit court, this Court stated that it

> believes that the Legislature, in creating W. Va. Code § 46A-5-101(1), has created a mechanism by which those who have suffered no quantifiable harm may yet recover civil penalties for being subject to undesirable treatment described in Article 2 of the Act. We find that by including the option for consumers to pursue civil penalties, the Legislature intended that § 46A-5-101(1) function, in part, as a disincentive for creditors to engage in certain undesirable behaviors that might not result in actual damages. . . .
>
> [C]ivil penalties are not punitive damages. . . . Civil penalties are their own separate class of damages, taking on both compensatory and punitive characteristics.

Id. at 568-69. Accordingly, the Legislature could not have intended this generic penalty (that, in part, was intended not to punish but to compensate for minor, technical or even trivial violations, where damages cannot be quantified) to apply as its primary deterrent for the type of serious common law fraud at issue here.

In considering this guidepost, the Court should look elsewhere and be mindful of the full gamut of civil and criminal penalties which might be invoked under analogous facts or circumstances. *See e.g., Myers v. Central Florida Investments, Inc.*, 592 F.3d 1201, 1222-23 (11th Cir. 2010)("When considering criminal penalties, a reviewing court considers *both* fines and imprisonment."); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed Cir 2003)(same). In *Myers*, the Court of Appeals for the Eleventh Circuit reasoned that a one year jail sentence under Florida law for battery was sufficient notice to the defendant of the seriousness of similar actions in upholding a $500,000 punitive damage award. Here, it is certainly no surprise that West Virginia has criminalized fraud. Under W.Va. Code § 61-3-24, fraud involving money, goods, or property in excess of $1,000 is a felony punishable by up to 10 years incarceration. The 10-year sentence under West Virginia law provides similar notice to Quicken of how our Legislature views fraud.

Moreover, under W.Va. Code § 46A-7-108, 109 & 111, the Attorney General has the power to issue a statewide injunction prohibiting Quicken from engaging in any conduct in violation of the CCPA and to recover a penalty in a civil action on behalf of a consumer, who, like the Plaintiffs, was assessed charges in violation of the CCPA. The penalty is significant: up to the greater of the loan finance charge or ten times the amount of any excess charge by the lender. Here, the loan finance charge alone was $520,065.61.

Even more drastic, a lender's license to do business in this state may be revoked under W.Va. Code § 31-17-12(a)(6) if it "has committed any fraud or engaged in any dishonest activities with respect to any mortgage loan business in this state or failed to disclose any of the material particulars of any mortgage loan transaction in this state to anyone entitled to the information." Any one of these three criteria would be sufficient to invoke this *death penalty* upon a lender, but *all three* have been established against Quicken in this case. Numerous federal circuit courts of appeals and state supreme courts have given considerable weight to a defendant's notice of similar license-stripping statutes under *Gore*.[16] Certainly, these civil and criminal penalties, taken together, are sufficient to give Quicken "fair notice" that a substantial

[16] *See e.g., Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir.2003) (upholding a punitive award nearly seventy-five times larger than the potential civil fine where the defendant was "subject to revocation of its license, without which it [could not] operate"); *Greenberg v. Paul Revere Life Ins. Co.*, 91 Fed. Appx. 539, 542 (9th Cir.2003), *cert. denied*, 542 U.S. 939, (2004) (upholding a $2.4 million punitive award without discussing potential civil fines but "[c]onsidering that possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses"); *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 906-07 (Ky. 2008)(considering loss of license to sell motor vehicles without discussing civil fines); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 992 (Idaho 2004) (upholding a $300,000 punitive award without discussing the size of potential civil fines but noting that "[e]ven the threat of losing licensure in the State did not have an immediate [deterrent] effect upon" the defendant); *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143 (Ohio 2002) (upholding a $2.5 million punitive award where the potential civil fine was $3,500 per violation and the defendant could "lose its license to engage in the business of insurance in Ohio"); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 489 (Or. 2001) (upholding a $1 million punitive award where the potential civil fine was $25,000 per violation and "administrative sanctions" included "the loss of a business license").

punitive award could be made if it engaged in the kind of fraudulent, opportunistic conduct which formed the basis of this predatory lending case. Nothing more is required.

II. The Circuit Court Did Not Punish Quicken For Taking An Appeal

For its second assignment of error, Quicken states that "[t]he Circuit Court acted contrary to law, justice and Quicken Loans' right to due process of law by increasing the amount of punitive damages on remand, effectively punishing Quicken Loans for taking a lawful, good-faith and partially successful appeal." However, Quicken fails to inform this Court that all parties agreed in light of this Court's general mandate that Judge Sims would not be constrained by Judge Recht's previous award and was free to make the award that he felt most appropriate.

> THE COURT: So, you believe I ought to do an independent analysis based upon my review of the evidence and exhibits, determine whether there's an appropriate punitive damage award or not, and, then, *I'm free to set whatever punitive damage award I believe is appropriate?*
>
> MR. GOODWIN (Petitioner's Attorney): *Absolutely.*
>
> THE COURT: *And I'm not bound by anything Judge Recht did?*
>
> MR. GOODWIN: *Absolutely not.*
>
> . . .
> THE COURT: So, in essence what we're doing is *we're taking the same evidence that has previously been presented, and we're presenting it to a new jury, which is me.* That's, in essence, what we're doing.
>
> MR. GOODWIN: *Exactly.*

4/9/2013 Status Hearing at 16-18 (A731-733). Accordingly, the circuit court did nothing more than follow this Court's directive with Quicken's full blessing. Failed litigation strategy and adverse results are not subject to rescue by some ill-defined notion of due process. The Ninth Circuit Court of Appeals case from 1986 that Quicken relies on bears no resemblance to the unique procedural history we have here. Accordingly, this assignment of error, which is at best unfair to the circuit court, should be summarily rejected.

III. The Circuit Court Performed A Proper *Garnes* Analysis And In No Way Punished Quicken For Any Lawful Conduct

In its third assignment, Quicken relying on *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) stretches even further in arguing that the circuit court unconstitutionally punished it for perfectly legal conduct. In *Bordenkircher*, the United States Supreme Court ruled that a prosecutor did *not* violate a defendant's due process rights by threatening the defendant with more serious felony charges if he did not accept a plea bargain. Quicken argues that the circuit court focused "displeasure on Quicken Loans' decisions to litigate this matter and pursue all legal redress for what it has believed (and continues to believe) to be the circuit court's serious legal errors and consequent unjust judgments." Quicken Brief, at 18.

Whether it is *Bordenkircher* or *Gore*, Quicken is grasping at straws. In fact, Quicken completely ignores the law on point, as *Garnes* requires a circuit court to consider as part of its reprehensibility analysis "whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him." *Syl. pt.* 3, *Garnes*, 186 W.Va. 656, 413 S.E.2d 897.[17] After finding Quicken's obstinate belief that it did no wrong here to be irrational to the point of losing touch with reality and, therefore, demonstrating no accountability, the circuit court concluded consistently with *Garnes*:

> [I]t is apparent that Quicken Loans did not accurately evaluate the egregiousness of its conduct, its potential liability, and the potential for a large damages award against it.
>
> Quicken Loans has had, and continues to have, an opportunity to resolve this matter by way of settlement. There is no evidence before this Court that it has ever shown any interest in settling this matter with the Plaintiffs. Quicken Loans instead, as it is clearly entitled to do, chooses to do battle, to hold fast to its' position that it has done little or no wrong in this action, and has caused minimal damage. Quicken Loans chose to fully litigate this matter at trial and on appeal, and now chooses to fight on, post-appeal, as is its right. However, it

[17] Liability was painfully obvious from the beginning. As this Court expressly made clear – "[t]his [was] not a close case," yet Quicken offered nothing.

> cannot now complain that it was somehow "vindicated". . . Quicken Loans proceeded in this matter, at its own peril, when others reached compromises, with full knowledge of the consequences should it not prevail. Quicken Loans did not prevail and must now face the music.

Remand Op. at 18 (A908). Accordingly, the circuit court followed *Garnes* as required.

Under the same heading, as part of a single paragraph, Quicken further argues that the circuit court's reliance on Quicken's "use of discount points" also violates the general principle that it may not be punished for *lawful* conduct. Quicken's use of discount points is in *no way* lawful. While this Court determined Quicken to have made an intentional misrepresentation, it found Ms. Jefferson failed to establish reliance by clear and convincing evidence. Nevertheless, Quicken's *misuse* of discount points remains unconscionable, as well as unfair and deceptive, and, therefore, unlawful under West Virginia law. 2/25/10 Op. at 17 (A143), 20 (A146). Furthermore, the phony discount points from which both Quicken and its employee Johnson received a cut at closing were indeed a motivating factor in the false promise of refinancing and the concealment of the balloon payment. As referenced *supra* at 18, sufficiently related conduct, whether it be lawful or unlawful or in or out-of state, can be properly considered in the reprehensibility analysis. *See, State Farm*, 538 U.S. at 422.

Similarly, Quicken complains that the circuit court "relied on a supposed violation of W.Va. Code § 33-11A-11(c) ..., yet the trial court never found any violation of this statute ...." It bears repeating that Quicken encouraged the circuit court to take a fresh look at the evidence and confirmed for Judge Sims that he was not bound by what Judge Recht had found. The fact that Judge Sims noticed on his own a fairly obscure statutory violation that the parties had not identified only demonstrates the detail upon which he reviewed the record. Judge Sims discussed this violation, which is reviewed under the abuse of discretion standard, in the related context of the (unlawful) role that the non-lawyer, notary-closing agent played in facilitating the

fraud at issue here. Since Quicken did not employ a lawyer, but charged the Plaintiffs for these legal services, the circuit court took the opportunity to elaborate on its prior finding of excessive closing costs. In any event, the conduct at issue was not lawful conduct and the circuit court's discussion on this fine point amounts to surplusage.

IV. The Circuit Court Did Not Enhance Its Award On Account Of Wealth

In its fourth assignment of error, Quicken argues *Perrine*, 694 S.E.2d at 888 ("[T]o accomplish punishment and deterrence for ... a wealthy company, a punitive damage award must necessarily be large.") is in conflict with Supreme Court precedent by classifying wealth as an "aggravating" factor and that this Court should take the opportunity to revisit *Perrine*. Strangely, Quicken makes this argument despite the fact that Judge Sims adopted Quicken's approach and expressly did not "enhance" the punitive damage award on account of Quicken's wealth. Remand Op. at 16 (A906). Accordingly, the error Quicken complains of does not exist.

Nonetheless, Respondents respectfully submit that *Perrine* was rightly decided consistently with settled law. "DuPont asserts its wealth has no bearing on the question of whether the punitive damages award in this case was excessive. We reject this argument on the simple ground that the United States Supreme Court approved of the *Garnes* factors in its review of those factors in *TXO*..." *Perrine*, 694 S.E.2d 815, 888. Plaintiffs summarized Quicken's financial statements in a chart admitted into evidence as Pls. Ex. 57 (A2991) and later sealed.

V. There Was No Punishment For Dissimilar Acts Or Harm To Others

Under the fifth assignment of error, Quicken ignores *Garnes* entirely and misapplies Judge Sims' analysis. Syllabus point 3 of *Garnes* provides, in part: "Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." Judge Sims devoted nearly two pages to this

Garnes factor, detailing how Quicken's misconduct harmed the Plaintiffs. Noting that the loan terms "boggle the mind," he found the nature of the likely financial harm to the Plaintiffs to be "enormous." More than that, Plaintiffs were harmed emotionally: "[T]he looming threat of losing one's home can only cause incalculable psychological harm and mental distress. The plaintiffs described in detail the toll this took on them emotionally." Remand Op. at 9 (A899).

Toward the end of his analysis, Judge Sims referred vaguely to the 2008 financial crisis. Quicken complains this was "flatly unconstitutional" because it punished Quicken for harming others. Quicken Brief, at 21. However, this was merely an incidental reference. Judge Sims was not blaming Quicken for our country's economic woes or punishing Quicken for the 2008 financial crisis. At most, he was recognizing this kind of harm is not theoretical but, in fact, very real. The balance of his analysis makes this abundantly clear.

Furthermore, under *Perrine*, the disparity between the punitive award and harm is a *mitigating* factor, not an *aggravating* factor. Given the circuit court's findings of "enormous" financial harm and "incalculable psychological harm and mental distress", which are reviewed under a clearly erroneous standard, there is little to no disparity between the punitive award and harm or potential harm to Plaintiffs. As such, the short comment Quicken wildly attempts to magnify had no impact on the analysis.[18] Accordingly, Judge Sims properly applied this *Garnes* factor and committed no error.

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[18] Furthermore, while the Court did not expressly adopt its position, Philip Morris contended before the Court and submitted a jury instruction below that would *permit* a trial court to use harm to others as part of the "reasonable relationship [between the punitive award and harm to plaintiffs'] equation" but not directly as punishment. *Philip Morris USA v. Williams*, 549 U.S. 346, 356 (2007). Here, the general, passing reference to the harm brought about by "subprime" and "high risk" loans was located under the heading dedicated to the reasonable relationship analysis. Remand Op. at 9 (A899). Additionally, the *Philip Morris* court, while prohibiting direct punishment, would surprisingly allow a plaintiff to show harm, even potential harm, to others to demonstrate reprehensibility. *Id.* at 355. Here, Judge Sims *did not* use the 2008 financial crisis in his reprehensibility analysis at all and certainly went nowhere near direct punishment in any part of his opinion.

VI. None Of Quicken's Five Arguments Contained In Its "Catch All" Assignment Amount To Error

For its sixth assignment of error, Quicken first repeats its argument regarding the third guidepost of *Gore*. Respondents have thoroughly addressed this argument *supra* at 25-29.

Next, Quicken accuses the circuit court of misusing one of the *Garnes* factors: the appropriateness of punitive damages "to encourage fair and reasonable settlements when a clear wrong has been committed." The circuit court correctly applied this factor, which is similar to the earlier discussed *Garnes* factor addressing the willingness of a defendant to make amends for its wrong. The focus of this factor as explained by *Perrine* relates primarily to *future* litigants: "[W]as the award large enough so that a future defendant who has committed a clear wrong will be encouraged to accept a fair and reasonable settlement rather than force the wronged plaintiff into litigation and risk incurring a similarly large punitive damages award?" 225 W.Va. at 556, 694 W.Va. at 889. There is no doubt that a large punitive damage award is necessary to prevent Quicken and other large, well-funded lenders from dragging consumers through litigation instead of reaching a fair, reasonable settlement where the lender has committed a clear wrong. Thus, this factor supports the circuit court's punitive award.

Third, Quicken, citing nothing new, rehashes its argument that attorney fees and costs awarded in this case should not be included in *TXO's* compensatory-to-punitive damages ratio. This argument was expressly rejected in the syllabus of this Court's prior Opinion, in line with the clear majority of courts deciding the issue in the context of a fee shifting statute. *See, e.g.*, *Blount v. Stroud,* 915 N.E.2d 925, 943-44 (Ill. Ct. App. 2009)(canvassing cases from across the country). Here, Quicken attempts to make a constitutional issue out of the fact that Plaintiffs' attorney fees and costs incurred fending off its foreclosure and pursuing consumer rights greatly exceed the compensatory damages. While this issue has been conclusively decided against

Quicken, Plaintiffs would point out that the same was true for two cases this Court relied on in its 2012 Opinion. *See*, *Quickens Loans*, at fn. 41 (Punitive award upheld where plaintiff in *Blount* received $282,000 for compensatory damages; $1,000,000 for attorney fees; and $2.8 million in punitive damages); *Willow Inn, Inc. v. Public Service Mut. Ins. Co.,* 399 F.3d 224 (3rd Cir. 2005)(Punitive award upheld where plaintiff received $135,000 in attorney fees; no compensatory damages; and $150,000 in punitive damages); *see also*, *In re USA Commercial Mortg. Co*, 2013 WL 3944184 (D. Nev.) (Punitive award upheld where plaintiffs received $2,464,052 in attorney fees; $22,321 in compensatory damages and interest; and $800,000 in punitive damages).

Fourth, Quicken, in its single-paragraph fashion and again by citing only the general principle of fair notice under *Gore*, attempts to convince this Court that it should *not* apply its new syllabus point to this case but apply it only prospectively. Of course, the *Gore* Court itself applied its newly announced three guideposts to the case at hand. Moreover, it is the guideposts *themselves* that set the standards for fair notice – see discussion *supra*.

Moreover, Quicken did have fair notice that punitive damages could be awarded in consumer cases where the elements of common law fraud are satisfied. *See*, *Quicken Loans*, at fn. 39(2 of 2)(quoting, *Muzelak v. King Chevrolet Inc.*, 179 W.Va. 340, 344, 368 S.E.2d 710, 715 (1988)). Furthermore, as discussed *supra*, Quicken had notice of the severe civil and criminal penalties that it would be subject to for engaging in this fraudulent conduct. Finally, Quicken had fair notice that attorney fees awarded to consumers would be considered compensatory for ratio purposes when it designed a plan to defraud Plaintiffs and when it employed a litigation strategy that caused the Plaintiffs to incur hundreds of thousands of dollars in legal costs to save their home. Announcing its ruling, this Court stated:

> In light of the foregoing, and considering this Court's ***past recognition*** that, in general, fee-shifting statutes are compensatory and not punitive in nature, we

find persuasive the argument that the attorneys fees and costs awarded under West Virginia Code § 46A-5-104 shall be included in the compensatory to punitive damages ratio where, as here, punitive damages are available to Plaintiff because there was a finding of common law fraud.

230 W.Va. 306, 737 S.E.2d at 666 (emphasis supplied). *See also*, *id.* at fn. 42 ("Indeed, this is wholly consistent with *Garnes*, which directs that review of a punitive damages award should, at a minimum, consider, among other factors, '[t]he costs of the litigation.'"). Out of fifteen cases cited by this Court under the heading, "Attorney Fees as Compensatory Damages", twelve had been decided before Quicken defrauded Ms. Jefferson. Furthermore, a clear majority rule to include attorney fees obtained pursuant to a fee shifting statute existed across the country. *See e.g.*, *Willow Inn, Inc.*, 399 F.3d 224; *Diviney v. Nationsbank of Texas, N.A.*, 225 B.R. 762, 777 (10th Cir. 1998); *Hollock v. Erie Ins. Exchange*, 842 A.2d 409 (2004 PA Super).

Fifth, Quicken states that the $98,800 award was for the "negligent violation of the appraisal statute" and its inclusion "grossly inflated" the compensatory/punitive multiplier. Regardless of what claim(s) these damages flow from, they may be included in the multiplier provided the claim(s) are *related* to the supporting fraud claim.

> If a court is not limited to compensatory damages that actually occurred in calculating the ratio, it follows that a court is not confined only to the compensatory damages under particular claims and instead can look at damages found by a jury on related claims. *Cf. Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 668 (6th Cir.2005) (combining compensatory damages from separate claims when calculating ratio even though the punitive damage award was only for one claim). Accordingly, *State Farm*, *BMW*, and *TXO* all suggest that a court can aggregate compensatory damages from multiple related causes of action when comparing compensatory damages to punitive damages.

Fastenal Co. v. Crawford, 609 F.Supp.2d 650, 661 (E.D. Kentucky 2009).

In its 2012 Opinion, this Court already determined that attorney fees awarded under the CCPA, which Act *may not* itself allow for punitive damages, could be included in the ratio analysis. *Quicken Loans*, at syl. pt. 11 & fn. 43 (rejecting Quicken's proposed claim by claim

analysis for lack of support).[19] Of course, the common law fraud claim and the consumer protection claims are undoubtedly related. Indeed, the fraud claim and the freestanding unconscionable inducement claim under § 46A-2-121(1)(a) are based on identical facts. *Id.* at 657-58. Thus, aggregating compensatory damages for related causes of action would appear to be *the law of the case*. Similarly, as discussed *supra* at 4-5, the inflated appraisal facilitated this fraudulent loan and was joined with the false promise of refinancing to persuade Ms. Jefferson to accept this loan. Even if the Court were to distinguish and subtract the $98,800 damage award, the ratio remains well within constitutional limits at 3.9 to 1.[20]

VII. The Circuit Court Properly Exercised Its Authority To Refuse To Enforce The Loan, While Preserving Quicken's Security Interest

VIII. The Single Reference To "Status Quo" In This Court's Opinion Is Not Applicable To The Claims Addressed By The Circuit Court

In assignments of error seven and eight, Quicken accuses the circuit court of outright betrayal of this Court's mandate in regards to the remedies the circuit court awarded as alternatives to loan cancellation. However, Quicken's protests of clear error are fueled only by misdirection. Quicken seizes upon a single phrase from this Court's lengthy Opinion for the impractical proposition that Plaintiffs must return the loan principal to Quicken as a condition precedent to any remedy against the loan obligation regardless of the legal theory upon which the Plaintiffs prevailed.

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[19] Whether a violation of Article 6 of the CCPA prohibiting unfair and deceptive acts can serve as a predicate for a punitive damages remains an open question. *See, Quicken Loans* at fn. 39(2 of 2).

[20] While the circuit court apparently did not include any sum for the unenforceable loan on the compensatory side of the ratio, Respondents submit that it should have included the total unenforceable finance charge of $520,065.61 as compensatory damages in light of the potential harm to the Respondents or, at a minimum, the $83,313.91 in accrued finance charges that Ms. Jefferson has been relieved of paying as compensatory damages in the ratio analysis. Pls. Brief on Remand at 33-37 (A589-593). While Respondents are satisfied with the punitive damage award, they do object to the circuit court's use of the 5 to 1 ratio as the "outer limit" in this case. *See, id.*

> Plaintiff has failed to offer any authority tending to support forfeiture of the loan principal as an equitable remedy under the unfair and deceptive acts provisions of the Act, as set forth above. To the contrary, this Court finds that a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible.

Id. at 662. The first problem with Quicken's argument is that this statement is limited to the general equitable powers of the court that are expressly invoked in Article 6 of the CCPA, prohibiting unfair and deceptive acts or practices. In footnote 38, this Court extended its instruction to Plaintiffs' common law fraud claim *but no further.*

This Court separately addressed the legal remedy provided by statute for unconscionable conduct and unconscionable loan agreements.

> Applying these rules of statutory construction, therefore, we must conclude that although *the circuit court had the authority to refuse to enforce the Note and Deed of Trust in this case* pursuant to the provisions of West Virginia Code § 46A-2-121, the clear language of the statute simply does not allow the court to cancel Plaintiff's debt obligation. Therefore, this Court finds that the court committed error in canceling Plaintiff's debt obligation under West Virginia Code 46A-2-121.

Id. at 661 (emphasis supplied). § 46A-2-121 (emphasis supplied) provides:

> (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:
>
> (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, *the court may refuse to enforce the agreement*, or
> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, *the court may refuse to enforce the agreement*, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

Thus, circuit courts have the legal authority to refuse to enforce a loan agreement in whole or in part as a matter of *law*, not *equity*. In fact, the very intent of the CCPA was to

eliminate the practice of including unconscionable terms in consumer agreements, *Syl. pt.* 3, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), and to provide an avenue of relief for consumers that did not exist at common law. *See e.g.*, *Cole*, 230 W.Va. 505, 740 S.E.2d at 568. As a remedial act, this Court has consistently held that the CCPA should be construed liberally in favor of the consumers whom it was intended to protect. *E.g.*, *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 711 S.E.2d 577, 583 (2011). Given the purposes of the CCPA and the plain language of the statute, the remedy available to the circuit court is clear: it may void an unconscionable loan. *See e.g.*, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556, 571-72 (2013) ("the [CCPA] says that . . . a contract may be voided if it was either 'induced by unconscionable conduct' or if the terms of the contract were unconscionable at the time it was made.) (Justice Ketchum, concurring).

The argument advanced by Quicken and accepted by this Court was that the circuit court's authority under § 46A-2-121 is constrained by and must be read in *pari materia* with § 46A-5-105, which does not permit the cancellation or voiding of secured loans, such as this. Subject to this constraint, the circuit court was charged with providing a remedy to the prevailing Plaintiffs. But the circuit court was not free to read something into the statute that it does not say – a prohibition that includes something as drastic as a tender obligation on the part of the consumer. "Furthermore, as we have made clear in prior cases, '[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.'" *Quicken Loans*, 737 S.E.2d at 661.

Therefore, the circuit court stuck to the letter of the statute and this Court's Opinion and continued to hold the Note and Deed of Trust unenforceable as a matter of law. However, the

circuit court recognized that it must now preserve the security interest under § 46A-5-105. Accordingly, the Deed of Trust remains a valid lien against the subject property. The lien operates just as any other lien, and should the Plaintiffs wish to transfer any interest in the property, they will necessarily have to satisfy the lien as outlined by the circuit court. To be clear, the reference to "heirs, successors or assigns" is simply intended to bind those acquiring an interest involuntarily or otherwise charged with acting on behalf of the Plaintiffs. Plaintiffs cannot voluntarily transfer their interests without addressing Quicken's lien.

The circuit court's remedy properly balances the intent of the CCPA not to enforce unconscionable consumer agreements with the preference given to secured loans. Finally, as a practical matter, few, if any, consumers who are victimized by predatory lending transactions will be able to tender the full loan principal as a condition to accessing this remedy. If this Court adopts Quicken's position, this remedial statute will become entirely illusory.[21]

With respect to the cash award of $98,800, Quicken has never appealed the circuit court's general liability findings under W.Va. Code § 31-17-8(m)(8). 2/25/10 Op. at 22-24 (A148-150). Quicken did, however, appeal the remedy of loan cancellation. This Court found that the statute does indeed permit loan cancellation for willful violations, but concluded that the circuit court found only a negligent violation of this particular statute and committed error by cancelling the loan. *Quicken Loans*, 737 S.E.2d at 660. As a lesser but included alternative, the circuit court had the authority on remand to award damages for "negligent" violations under § 31-17-17(c) in lieu of loan cancellation under § 31-17-17(a). Based on evidence already in the record and consistent with prior rulings, the circuit court awarded the Plaintiffs $98,800, which represents

[21] *See*, Amici Brief of National Association of Consumer Advocates, Mountain State Justice, West Virginia Attorney General, and West Virginia Association for Justice in Support of Plaintiffs and Respondents Lourie Brown and Monique Brown, 10/21/11, at 15-16 (discussing the importance of a real remedy)(A483-484); *see also*, *id.* at 3-6 (discussing the rise of predatory lending)(A471-474).

the amount that the loan of $144,800 exceeds the statutorily proscribed legal limit of $46,000 (*i.e.*, the subject property's true market value as found by the circuit court). It further represents the amount that this illegal, unfair, deceptive and fraudulent loan left the Plaintiffs underwater. In any event, the award was entirely offset by the proceeds from Plaintiffs' settlement with Guida.

IX. Quicken Will Stop At Nothing To Deny Plaintiffs A Single Recovery Of Attorney Fees And Costs

Contrary to Quicken's argument, this Court did not even address—let alone decide—the issue of whether Guida's settlement proceeds could be offset against attorney fees and costs.

Quicken did not raise this issue in its first appeal. Why? Because Quicken *affirmatively represented to this Court that it was paying the fee award.* It did so in an effort to mitigate its punitive damage exposure. In analyzing the aggravating factors under *Garnes*, Quicken argued that the cost-of-litigation factor should not weigh against it because Quicken, in fact, "[was] already paying plaintiff's attorney fees." Brief of Petitioner Quicken Loans Inc., 09/06/11, at 32 (A395). Accordingly, as it was framed and briefed by the parties, the offset issue *only* involved the $17,000 restitution award and, potentially, the loan cancellation remedy. *Id.* at 39 (A402).[22]

Now Quicken insists that it is entitled to a dollar-for-dollar offset against the attorney fees and costs it must pay. That is, Quicken says that all of the Plaintiff's compensatory damages, including attorney fees, must be offset by the full amount of Guida's settlement. This represents the *third* distinct and most extreme position Quicken has taken on this issue, which, if adopted, would eviscerate the award.[23] The circuit court properly rejected this argument.

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[22] While Quicken considered *both* attorney fees and loan cancellation as punitive damages on appeal, Quicken expressly preserved the issue of offset with respect to loan cancellation. However, Quicken made no such reservation for attorney fees. *Id.* at 40 (A403).

[23] Quicken has changed its position multiple times during the course of litigation. In the post trial briefing, Quicken argued that it should be entitled to a $280,000 offset—representing the amount of the fee paid to Bordas & Bordas out of Guida's settlement. *See*, Defendant's Response Brief Regarding Attorney Fees at p. 4, filed 9/1/10 (A164). In briefing the first appeal, Quicken did not seek any offset

To begin with, the circuit court's ruling was correct under principles of judicial estoppel. West Virginia law is well settled:

> Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken . . taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process."

Syl. Pt. 2, *West Virginia Dept. of Transp., Div. of Highways v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005). Quicken unequivocally informed this Court it was paying the Plaintiffs' attorney's fees. Having done so and having obtained a review of the punitive damage award on that basis, which review resulted in a favorable remand, Quicken should not be allowed to adopt a new, inconsistent position. Furthermore, Plaintiffs were prejudiced by this misstatement, as they could not possibly comprehend the need to oppose something that Quicken did not seek. As such, Plaintiffs made no argument specific to the fee award that Quicken touted it was paying and allocated only a single sentence overall to the substantive argument on the issue of offset – because there was scarcely anything to argue over. See, Brief of Respondents, 10/21/2011, at 48-49 (A459-60).

Had Quicken fairly presented the issue, this Court could have resolved it more than a year ago by simply reviewing two critical and undisputed facts from the record below.

First, the attorney fee award does not represent a "joint obligation" under *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990), because the award was made pursuant to W.Va. Code 46A-5-104 and 31-17-17(c)—neither of which applies to appraisers. These statutory provisions govern the conduct of creditors, lenders, and

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because it contended attorney fees were punitive in nature, not compensatory, and because it strategically represented that it was paying the fees in its *Garnes* analysis. Now, however, Quicken argues that it should receive an offset of the fee award against the entire amount of Guida's settlement.

mortgage brokers, and exclude appraisers, who are governed by W.Va. Code § 30-38-1, *et seq.*, which, importantly, does not provide for fee shifting.

Second, the Plaintiffs' fees here were not only capable of being divided but were, in fact, divided. The only fees awarded against Quicken were those attributable to the claims against Quicken. Notably, 71% of the initial fee bill submitted by the Plaintiffs covered time occurring *after* the defendant, Guida, had settled and, therefore, solely related to Quicken. And, of course, 100% of the supplemental fee bill reflects time occurring *after* Guida settled. The remaining time was carefully reviewed by the Plaintiffs, and all time relating solely to Guida's claim was eliminated (attending Guida's mediation, preparing a lengthy DVD settlement presentation for Guida's insurer, responding to Guida's discovery and summary judgment motion, etc.). Affidavit of Jason Causey, 8/30/2010, at 3 (A2938). *Zando,* of course, requires "a single, indivisible loss" before an offset can be applied. Here, attorney fees represent a *divisible* loss for which Quicken alone is liable.

Because Plaintiffs in reality seek only *one* recovery of fees, the circuit court was able to conclude that public policy prevented an offset of the statutory attorney fee award. Quicken first contends that this Court has foreclosed the issue in its favor. However, the circuit court correctly found that this Court did not address attorney fees, directly or indirectly, for purposes of applying the offset it granted. *See*, Remand Op. at 20 (A910). Judge Sims then rightly concluded that applying an offset under the circumstances would frustrate the public policy behind the fee statute:

> This Court concludes that where attorney fees and costs are awarded for fraud and unconscionable conduct in violation of the WVCCPA, a prior settlement should ***not*** impact the Plaintiffs' ability to recover said attorney fees and costs. To permit so would be contrary to the clearly stated legislative and public policy of enabling Plaintiffs to pursue legal actions were [sic] statutes have been violated and of ensuring effective access to the legal system and would have a chilling effect on said policy.

Id., at 21(A911) (emphasis in original).

Awards of attorney fees are an integral and essential part of our consumer law. Permitting attorney fees to be offset, particularly where Plaintiffs seek only a single recovery, would prevent consumers from fully accessing the courts to enforce their legal rights, thereby defeating those rights in the process. *Cf., Auwood v. Harry Brandt Booking Office*, 850 F.2d 884 (2d Cir. 1988).

Still, Quicken attempts to counter with *Corder v. Brown*, 25 F.3d 833 (9th Cir. 1994) for the proposition that "offset is applicable to attorney fees." Quicken Brief, at 28. But even *Corder* does not adopt the view Quicken is advocating here. *Corder* says that attorney fees may only be offset against attorney fees—not, as Quicken argues, against all compensatory damages. Ironically, *Corder* reflects Quicken's first position on this issue. *See, supra* at fn. 23.

X. The Mandate Of This Court Leaves The Issue Of A Supplemental Fee Award To The Discretion Of The Circuit Court

Quicken suggests that the issue of whether the Plaintiffs are entitled to additional attorney fees was resolved by this Court's mandate. Quicken makes two arguments, but neither of them withstands even the slightest scrutiny. First, Quicken points to language in the mandate stating that "the parties shall each bear their own costs." According to Quicken, by refusing to award costs this Court has effectively disposed of the Plaintiffs' request for attorney fees. However, W. Va. R. App. P. 24 makes it abundantly clear that "costs" include only the costs of preparing, assembling and filing the appendix, none of which the Plaintiffs even incurred, and *do not* include attorney fees. Thus, the directive regarding costs is not relevant.

Second, Quicken argues that a circuit court is powerless to award fees relating to an appeal where the mandate has not included a directive to do so. For this proposition, Quicken cites *Powell v. Paine,* 226 W.Va. 125, 697 S.E.2d 161 (2010). But *Powell* says nothing of the sort. This Court in *Powell* issued a *limited* mandate specifically authorizing the circuit court to merely "reinstate[ ]...the appellant's teaching license." *Id.* at 129, 165. Here, however, this Court issued a *general*

mandate; therefore, the circuit court had authority to award attorney fees for a successful appeal. *See*, *Orndorff v. West Virginia Dep't of Health,* 165 W.Va. 1, 267 S.E.2d 430 (1980) (construing a similar remedial statute to permit recovery of attorney fees for services on appeal).

The final question is: Was the Plaintiffs' defense of the appeal successful? The test for determining whether a party is entitled to a recovery of statutory attorney fees is whether he "achieved [an] appreciable advantage in the litigation." Put another way, did the plaintiff achieve a "material alteration of the legal relationship of the parties"? *State ex rel. West Virginia Highlands Conservancy, Inc. vs. W.Va. Div. of Environmental Protection,* 193 W.Va. 650, 655, 458 S.E.2d 88, 93 (1995). In light of this modest test, the circuit court was undoubtedly correct in finding "that the plaintiffs have substantially prevailed on appeal, particularly on the issues of fraud and unconscionability" and in concluding that "an award of additional attorney fees and costs is wholly fair and justified." Remand Op. at 21 (A911). As *West Virginia Highlands* indicates, success is measured from the standpoint of the litigation as a whole, not, as Quicken suggests, from the Plaintiffs' individual claims. In any event, the Plaintiffs on remand substantially prevailed on each of Quicken's remaining appellate issues.

XI. Plaintiffs' Attorneys' Billing Records Are Reasonable

Under the eleventh assignment of error, Quicken complains that the circuit court erred in its calculation of the attorney fees to be awarded to the Plaintiffs.

We begin with two legal principles. First, the amount of any award of statutory attorney fees is to be judged under an abuse of discretion standard: "The reasonableness of the award [of attorney fees] is to be judged by the abuse of discretion standard of review" and, in the absence of an abuse of discretion, "the trial court's decision is final." *Brown v. Thompson,* 192 W.Va. 412, 415, 452 S.E.2d 728, 731 (1994). Using a deferential standard of review "is appropriate in

view of the [lower] court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983).

Second, where there are some claims that would support an award of fees, and some that would not, the issue of whether to apportion a fee award is left to the trial court's sound discretion. *C.f.*, *West Virginia Highlands,* 193 W.Va. at 655, 458 S.E.2d at 94 ("court may ... apportion the attorney fees"); *Daily Gazette v. West Virginia Development Office,* 206 W.Va. 51, 65, 521 S.E.2d 543, 557 (1999) ("not compelled" to apportion). In determining whether apportionment is proper in a given case, the trial court should only reduce a fee award where there are "discrete" issues for which fees are unavailable. *See, e.g.*, *Hensley*, 461 U.S. at 436 ("Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."); *see also*, *Heldreth v. Rahimian,* 219 W.Va. 462, 467, 637 S.E.2d 359, 364 (2006) (the critical issue "is determining whether a separate and distinct factual development was required to support to those alternate theories of recovery ...").

Quicken's arguments fall into broad categories. The first argument relates to apportionment. According to Quicken, the circuit court erred when it awarded the Plaintiffs all of the attorney fees they requested because the claim for punitive damages would not, in and of itself, support a fee award. In advancing this argument, however, Quicken completely ignores *Heldreth* and its teaching. Here, the appellate issue involving punitive damages arose out of the same core of underlying facts as the Plaintiff's unconscionability claims. That is, the facts

supporting relief for unconscionability (for which an attorney fee is recoverable) were the same facts supporting an award of punitive damages. Even post appeal, it is difficult to parse out the time dealing exclusively with punitive damages. For example, the hearing attended by Plaintiffs' counsel involved all issues, as did the briefing with some sections of the briefs serving dual purposes or spilling over to others. In light of these facts, the circuit court did not abuse his discretion in awarding a fee that covered *all* of the Plaintiffs' related claims and theories.

The second argument is a more general attack on the circuit court's ruling. Quicken complains that the court did not adequately scrutinize the Plaintiffs' fee request and that the hourly rates it approved were higher than those previously approved.

The Plaintiffs' fee petition was fully documented, including affidavits from all of the attorneys who participated in the post trial motions, appeal and remand stages of the case together with their billing entries. *See*, Plaintiffs' supplemental fee petition and affidavits in support (A759-873). From its review of the petition, the circuit court concluded that both the work performed and the time expended were reasonable.

Next, Quicken complains that some of the Plaintiffs' billing records were reconstructed. However, Quicken overlooks the fact that reconstructed records were approved by this Court in the seminal attorney fee case, *Aetna Casualty & Surety Co. v. Pitrolo,* 176 W.Va. 190, 192, 342 S.E.2d 156 (1996)(Mr. Amos had not kept contemporaneous time sheets, so he attempted to reconstruct time sheets by going through his file"); *see also*, *Thompson,* 192 W.Va. 412, 452 S.E.2d 728. Quicken also claims that some of the billing entries are too "vague." Even if true, however, this is a technical deficiency because Quicken never claims that the total amount of time billed was excessive or unreasonable. Nor does it offer the billings from any of the four law firms that it employed in this case for comparison purposes.

Finally, Quicken complains that the hourly rates approved by Judge Sims were higher than those previously approved by Judge Recht. But Judge Sims was not bound by his predecessor's rulings on the prior fee petition. The hourly rates Judge Sims approved were supported by affidavits, which reflected additional experience and expertise since Judge Recht's award, and, moreover, were commensurate with the rates charged by attorneys with similar experience and skill.

CONCLUSION

The circuit court entered a judgment that was tailored to accomplish the societal goals of punishment and deterrence upon which the very precedent of punitive damages is based. This Court, like the circuit court, should reject Quicken's invitation to turn a blind eye to all that has gone on before. The nominal punitive damages award that Quicken seeks is not only antithetical to the very purpose of punitive damages, but would also bless the type of fraudulent and unconscionable behavior at issue here. West Virginia should not be open to the infamous business of predatory lending. This state's homeowners deserve real protection against mortgage fraud and, furthermore, the many law-abiding banks and mortgage lenders in this state's market deserve protection against unfair competition. Only by affirming the circuit court can the societal goals of West Virginia be accomplished.

Because Quicken cannot meet its burden of showing factual or legal error by the circuit court, the judgment in favor of Lourie Jefferson and Monique Brown should be AFFIRMED.

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CERTIFICATE OF SERVICE

Service of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO QUICKEN LOANS, INC.'S PETITION FOR APPEAL was had upon the Petitioner herein via e-mail and by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 5th day of December, 2013, to the following:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and **MONIQUE BROWN,**

Plaintiffs below,

Respondents

(From the Circuit Court of Ohio County, No. 08-C-36)

REPLY BRIEF OF PETITIONER QUICKEN LOANS, INC.

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I. Introduction and Summary

Petitioner Quicken Loans Inc. respectfully submits this reply memorandum in support of its petition. In the four-dozen pages of their brief, Respondents Lourie (now Jefferson) and Monique Brown urge this Court to approve forfeitures, the shift of a vast sum of attorneys' fees, and a punitive damages award that was *increased* by well over a million dollars on a remand that occurred *only* because of serious errors that the Circuit Court committed in its initial consideration of the case.

On remand, because the lawfulness of an award of punitive damages demands the *de novo* review of any and every court, Quicken Loans again defended its actions as best it could. This approach greatly displeased the Circuit Court, which castigated Quicken Loans repeatedly for defending itself, for successfully appealing, and even for failing to settle the case.[1] However irked the Circuit Court may have been by these actions, all were perfectly lawful and in no conceivable fashion subject to an additional punitive damages award.

Respondents are sensitive to this point, and they even momentarily concede that the Circuit Court's intemperate rhetoric was "strong and, perhaps, unconventional." Brief of Respondents ("Resp. Br.") at 12. Indeed it was. But it is not at all true that, by citing that "unconventional" rhetoric, Quicken Loans seeks to "divert this Court's attention" (*id.*) from the merits of any point on appeal. The Circuit Court wrote its own opinion, and it chose its own

[1] The Circuit Court declared that Quicken Loans "has had, and continues to have, an opportunity to resolve this matter by way of settlement." Remand Op. at 18 (A0000908). If this observation be true, Quicken Loans knows nothing about it. Have Respondents made settlement demands? They have, but a settlement is a mutual agreement, and no settlement on terms remotely acceptable to Quicken Loans has ever been possible. *Capitulation* is, of course, always an available "opportunity" for any defendant in any case, but a refusal to capitulate is lawful and hence cannot be the basis for punishment.

attention-grabbing language. Moreover, Quicken Loans very much wishes this Court to closely examine the important issues presented by its appeal.

Quicken Loans should first remind the Court, as briefly as possible, of the reasons why this appeal was necessary to begin with.

The most obvious reason is a jaw-dropping award of $3.5 *million* in punitive damages. The Respondents have not been physically harmed in any respect. They have not even been *economically* harmed in any way that they have ever been able to articulate, much less prove. Very much to the contrary, they took Quicken Loans' money, spent it as they wished, and then defaulted after *two* payments. Yet Quicken Loans stands before this Court ordered to pay, among other things, $875,233 in attorneys' fees and costs, and those $3.5 million in punitive damages. As it asked in its opening brief ("QL Br."), Quicken Loans asks again: *is* "the State of West Virginia commit[ed] to rational, fair remedies, and to proportional, fair punishments?" QL Br. at 3. For if it is, the judgment of the Circuit Court cannot withstand even casual scrutiny.

The massive punitive damages award teeters precariously atop a base of punishment and forfeitures. As for *damages at law* proximately caused by common-law fraud, the record simply does not disclose *any*.

However daunting may have been a balloon payment of remaining principal looming thirty years in the future, the simple fact is that Respondents did not make 360 timely monthly payments only to face that balloon. They made *two*. They also did not make payments on their adjustable-rate mortgage for three years only to see those payments suddenly and dramatically increase (and, as it turned out, they would not have). There was absolutely no evidence from which they could quantify damages from the lack of a quick refinancing, inasmuch as Heidi Johnson's supposed promise contained no substantive terms whatsoever, and

Respondents' ability to pay even a modestly lower monthly payment was never tested. In short, Respondents showed no damages for the claimed common-law fraud. Indeed, on remand, Respondents conceded that their actual economic damages were "minimal." Plaintiffs' Opening Memorandum on Remand, at 35 (A0000591). And before this Court, they concede that, even before the loan, they had no equity in the subject real estate. Brief of Respondents ("Resp. Br.") at 24 n.11.

Instead, while urging the Circuit Court (and now this Court) to impose forfeitures and seven-figure punitive damages on Quicken Loans, Respondents have conjured and exaggerated *hypothetical* harms that have not and *need not* ever befall them. The bizarre irony of their approach is that *if this Court's mandate had been obeyed on remand* – the equities balanced, the transaction unwound in a rational fashion, and the status quo restored as nearly as possible, then Respondents could *never* suffer any of the imaginary future harms about which they so prodigally speculate.[2]

Moreover, the Circuit Court's immense award of punitive damages cannot conceivably withstand review under the substantive due process guideposts established by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and then further explained and developed in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). Respondents' feign "curi[osity]" (Resp. Br. at 16) at Quicken Loans' reliance on this substantive due process law, and in so doing simply reveal their discomfort at its correct application. In any event, Quicken Loans cites and relies upon the *Gore* guideposts because they state the *mandatory* test

[2] Indeed, a borrower can – without the aid of any court – avoid such "harms" as a thirty-year stream of interest payments simply by defaulting, as Respondents did. Acceleration of the loan entitles the lender only to principal and interest accrued at the time of foreclosure, and not to theoretical post-foreclosure interest payments that the lender will never earn.

for constitutional excessiveness in each and every appellate court in the land, and they must be applied "exacting[ly]" by this Court. *State Farm*, 538 U.S. at 418.[3]

The $3.5 million award fares very poorly under the *Gore* guideposts. Quicken Loans' alleged misconduct involved a low-level employee, and Respondents presented *no evidence* that the employee's misconduct had been replicated on even one other occasion. The supposed harm that might have been (but was not) inflicted on Respondents would have been purely economic, and the law and Constitution quite rationally deem physical harm to be much more deserving of punishment. The punitive damages award vastly exceeds the modest restitution awarded to Respondents. Finally, the award even more vastly exceeds the specific, legislatively prescribed civil penalty made available to a private plaintiff for a single-transaction incident of consumer fraud.

The Circuit Court avoided the conclusion compelled by the guideposts by, at Respondents' eager urging, either ignoring them altogether (*e.g.*, the third guidepost) or contaminating its reprehensibility and harm analyses with improper considerations. As Quicken Loans showed in its opening brief – and Respondents have utterly failed to refute – the Circuit Court punished it for lawful conduct, including such innocuous, everyday characteristics as being a for-profit business. Further, and perhaps even more inappropriately, it punished Quicken Loans (to the tune of over a quarter-million in additional fees and costs, and over $1.3 million in punitive damages) for successfully appealing the Circuit Court's own prior errors.

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[3] *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), by comparison, is a procedural due process mechanism mandated by this Court in the wake of the Supreme Court's approval of a similar Alabama test in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). As a procedural due process protection, proper *Garnes* analysis should, in principle, prevent *substantive* due process violations regarding the size of punitive damages awards. Nonetheless, the *Gore* guideposts remain the ultimate, mandatory yardstick to determine whether such a substantive violation has occurred.

The Circuit Court did not stop there. In its zeal to vilify Quicken Loans, the Circuit Court also punished it for speculated harm to others not before the Court, including not only to those Wall Street mortgage investors who demurred to buy Respondents' specific loan, but to the nationwide pain caused by the entire "Great Recession" of the late '00s. Respondents attempt to assure us that the Circuit Court did not really *mean* what it so forcefully said, but courts speak through their orders, and this Court is bound to take the Circuit Court at its word.

The Circuit Court's punitive damages errors rest on underlying errors regarding "remedies." In this respect, the Court not only disregarded the law, but also this Court's plain mandates.

The most striking of these was the Circuit's Court's reinstatement of an unsustainable forfeiture – debt cancellation. And for good measure, the Circuit Court fashioned a brand-new forfeiture as well: an inexplicable $98,800 in purported "damages," which the court awarded just so that the damages-less Respondents can recover something "meaningful" from Quicken Loans.

Second, the Circuit Court rubber-stamped an *additional* $279,000 award of attorneys' fees and costs, most of them for Quicken Loans' appeal, and notwithstanding that this Court had refused to award those very fees and costs.

Third, the Circuit Court refused to apply this Court's dual holdings that (i) an award of attorneys' fees and costs under W.Va. Code § 46A-5-104 is compensatory in nature; and (ii) Quicken Loans is entitled to an offset of all compensatory damages by the amount of Respondents' pretrial settlement with former codefendants Dewey Guida and Appraisals Unlimited, Inc.

Hence, the Circuit Court's ruling leaves Respondents with

- the remaining principal of the loan with no personal obligation to repay a cent of it;
- restitution of all payments that they made to Quicken Loans;
- a $98,800 gift of something "meaningful";
- over $875,000 in fees and costs;
- $3.5 million in punitive damages; and
- nearly $600,000 of the $700,000 value of their pretrial settlement with Guida and Appraisals Unlimited.

Justice cannot tolerate such a result.

II. Argument

Quicken Loans offers one last *caveat* before it moves to its arguments in reply. Respondents' lengthy brief contains numerous mini-arguments that often consume merely a sentence or two. Quicken Loans will address a number of these in this reply brief, but makes no claim that it has addressed them all, or that any or all merits addressing. No point not specifically and expressly conceded by Quicken Loans in the record or in its briefs on this appeal is conceded.

A. The Award of Punitive Damages is Wildly Excessive and Violates Quicken Loans' Right to Due Process of Law

Quicken Loans' opening brief shows why the vast $3.5 million punitive damages award – which is based and heaped upon "relief" consisting solely of forfeitures and attorneys' fees – is constitutionally unsustainable. In this reply, we again discuss this question within the framework of the federal due process guideposts mandated by *Gore* and *State Farm*.

Reprehensibility. Aside from Respondents' utter lack of actual damages, the alleged fraud – which is, after all, the sole ground upon which the punitive award can rest – was

perpetrated by a single employee who worked at the lower levels of Quicken Loans' organization. There was no evidence that it was ever replicated, not even once.

Respondents know this, and so scramble to pretend that committing fraud was a corporate policy. But the policies about which they so vehemently complain are all perfectly lawful. Most notably, none instructs an employee to make a fraudulent refinancing promise.[4] Were Quicken Loans employees formerly permitted to make "forward-looking" statements? They were. And even if the future is hazier than the past, there is nothing inherently *fraudulent* about statements concerning events yet to come, even if those events do not wind up occurring. *Nothing* in the record suggests, much less proves, that Quicken Loans authorized a single employee on a single occasion to make an intentionally false "forward-looking" statement.

And again, there was *no* evidence that the alleged wrongdoing was ever *replicated*, which is the strict constitutional test for conduct relevant to the reprehensibility inquiry. *State Farm*, 538 U.S. at 423 ("Although our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.") (quotation and citation omitted). Accordingly, the fraudulent conduct must be considered isolated and hence less reprehensible than the acts of a recidivist.

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[4] Respondents do not even try to show that "fraudulently" concealing the amount of a balloon payment by neglecting to have a routine Truth-in-Lending document signed at closing could be connected to some corporate policy. At any rate, they have no proof that such an error occurred at even one other closing, much less that the error was deliberate. The fantastic theory that they posit at 17-18 n.6 is simply bizarre. ***No***, Quicken Loans does ***not*** "mean ... to say" that it sent Lourie Jefferson two distinct settlement packets, which differed only in the inclusion or exclusion of a Truth-in-Lending statement. Quicken Loans meant to say exactly what it said – the "evidence" of deliberate concealment of the amount of the balloon payment is extremely thin, especially to support a claim of fraud. And as for the order in which the documents are Bates-stamped, we note that the cited exhibit is Respondents', not Quicken Loans'.

Aware of Heidi Johnson's modest status within the Quicken Loans organization, Respondents can do no more than point out that other Quicken Loan employees were involved in processing Lourie Jefferson's loan application. Respondents' Br. at 21-22. But of course Heidi Johnson could not *make the loan* all on her own. Moreover, what matters is that she is the *only* person who allegedly participated in the refinancing-promise "fraud."[5]

And keeping this focus on the actual alleged fraud is essential here. Punitive damages can be awarded, if at all, only for common-law fraud. Violations of the Consumer Credit and Protection Act can result in statutory penalties, but not in punitive damages. *One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W.Va. 687, 425 S.E.2d 829, 833-834 (1992). Yet over and over, Respondents point to facts underlying their unconscionability claim, to conduct that was held to be merely negligent, and, most egregiously, to conduct that has absolutely nothing to do with their claims at all.

The law is very clear that the only constitutionally proper purpose of punitive damages is to punish for the conduct that harmed the plaintiff. *Philip Morris*, 549 U.S. at 354; *State Farm*, 538 U.S. at 424. Accordingly, it is utterly irrelevant to a proper reprehensibility inquiry to consider *any* conduct except, as Quicken Loans noted above, that which "*replicates*" the conduct that harmed the plaintiff.

Given this clear law, the Court should find it telling that Respondents continue to mention such things as Quicken Loans' unsuccessful attempts to sell Respondents' loan to

[5] Who – if anyone employed by Quicken Loans at all – was responsible for Respondents' failure to sign the Truth-in-Lending disclosure of the amount of the balloon payment at closing is not revealed in the record. Indeed, inasmuch as Quicken Loans believes that the record demonstrates that the loan packet that it provided to Ms. Jefferson before closing *contained* this disclosure, *see supra* n.4, any fault in failing to obtain Respondents' signatures on the document would likely lie with the unaffiliated notary who conducted the closing.

investors. Any transfer of an uncollectible note could have harmed only the transferee, and not Respondents.

In this regard, Respondents do shrink (ever so slightly) from fully endorsing the Circuit Court's remarks blaming Quicken Loans' actions for the effects of the recent nationwide recession. Remand Op. at 9 (A0000899); Resp. Br. at 33. Yet even here, Respondents' attempt to downplay these remarks is incongruous. While they describe the Circuit Court's remark as merely "incidental," and asseverate that the court was not blaming Quicken Loans, they then immediately posit that its remark somehow demonstrates that the (imaginary) harm in this case was "very real." *Id.* It of course does nothing of the kind, and it had no place in a proper analysis.

Finally, as a part of its deeply misguided reprehensibility analysis, the Circuit Court essentially abandoned its judicial role in order to make up a brand-new claim on behalf of the Respondents – an alleged violation of W.Va. Code § 33-11A-11(c). Respondents posit that somehow the Circuit Court's *de novo* review of the record entitled it to do so, Resp. Br. at 31, but this unsupported assertion ignores a judge's role in our system – as arbiter rather than inquisitor – as well as the bedrock due process violation that is inherent in the court's action. To be perfectly blunt, the Circuit Court invented a claim that Respondents did not make, about which Quicken Loans had no prior notice and hence no opportunity to defend, and *then* punished Quicken Loans on account of it. This course of action is a violation of due process of the most basic order. Plaintiffs are the masters of their claims, and they must plead them in their complaint. *See*, *e.g.*, *Sizemore v. State Farm General Insurance Co.*, 202 W.Va. 591, 505 S.E.2d 654, 661 (1998).

Disparity Between Award and Actual or Potential Harm. Quicken Loans can largely rely on its opening brief as regards the second guidepost. *See* QL Brief at 15-16. Respondents simply have not demonstrated actual damages. Merely adding up a stream of interest payments over three decades is not a meaningful measure of "harm," even "potential" harm. In support of this incongruous proposition, Respondents continue to rely, as they did below, solely on *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. App. 2007). The intermediate Oregon court did not endorse Respondents' proposition; instead, because the defendant failed to properly raise any contrary argument, the *Vasquez-Lopez* court simply "accept[ed] plaintiffs' figure." 152 P.3d at 958. The court did not make a holding of any kind; at most, it made an explanatory remark or observation. Moreover, Respondents have never contended that they were promised a refinancing at *no interest*, which their theory of potential harm from the supposed fraud necessarily presupposes. That Respondents put on no evidence of the "better rate" that Quicken Loans might have provided or of the present value of any difference between that rate and the contract rate simply underscores the paucity of support for their claim.

More importantly, well over eighty percent of the "compensatory" damages under the Circuit Court's math consists of its award of fees and costs. This award is entirely divorced from any real underlying harm to the Respondents, but rather is simply the cost of litigation. And where, as here, that cost is proposed to be *shifted* from to the defendant, any conceivable rationale to *punish* the defendant for the cost of litigation evaporates.

To make matters worse, a third of the Circuit Court's fee and cost award (and hence of its grossly enlarged punitive damages award) represents litigation costs occasioned by Quicken Loans' appeal. As Quicken Loans argued in its opening brief and reiterates herein, it

was lawfully entitled to appeal, did so in good faith, and prevailed on several important points. The Circuit Court cannot lawfully punish Quicken Loans for asking this Court to correct the Circuit Court's errors.

Civil Penalty. The Circuit Court ignored the essential guidepost comparing the punitive damages award to the legislatively prescribed civil penalty for similar misconduct altogether. Hence, its analysis was incomplete and *per se* erroneous under both the federal substantive due process guideposts and under *Perrine*'s reformulation of the *Garnes* factors.

This Court is not at liberty to disregard or disparage this guidepost as Respondents urge. It is a fundamental feature of the Supreme Court's mandatory test, and it is there because due process commands that a state give potential tortfeasors fair *advance* notice of the punishment that may attend certain misconduct.

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of *the severity of the penalty* that a State may impose.

Gore, 517 U.S. at 574 (emphasis added). Existing legislative pronouncements are particularly informative in this regard. *Id.* at 583.

If there are cases in which the third guidepost is less informative for reasons peculiar to the case, then there are others in which it warrants significant weight. *See, e.g.*, *Thomas v. iStar Financial, Inc.*, 652 F.3d 141, 149 (2nd Cir. 2010); *Clark v. Chrysler Corp.*, 436 F.3d 594, 607 (6th Cir. 2006). This case involves a single, allegedly fraudulent consumer transaction, and there is a civil penalty that is specifically prescribed for these circumstances.

That civil penalty is plainly the one previously identified by Quicken Loans: W.Va. Code § 46A-5-101. Not only is this penalty tailored for a private civil action involving a consumer fraud or frauds, it is the very civil penalty that persuaded this Court that the

Legislature did not intend that the additional deterrent of common-law punitive damages should be available for violations of Article 2 of the Consumer Credit and Protection Act. *See Bolen*, 425 S.E.2d at 833-834. To be sure, the Act does not displace otherwise-available remedies, and a plaintiff who can prove common-law fraud retains that cause of action, but § 46A-5-101 nonetheless stands as the clearest expression of legislative judgment regarding the appropriate punishment for fraud in the consumer credit setting like this one.

Respondents' proposed alternatives are clearly inapt. To begin with, of course fraud is occasionally prosecuted as a criminal offense, and W.Va. Code § 61-3-24 does authorize a lengthy prison sentence for one convicted of that crime. But the United States Supreme Court has cautioned very strongly against loose comparisons with criminal penalties. Quicken Loans had none of the procedural protections here that a criminal defendant would enjoy, most notably a presumption of innocence and requirement of proof of guilt beyond a reasonable doubt. And it respectfully submits that convicting it of fraud with such a presumption and burden of proof would have been utterly impossible. Hence, as the *State Farm* Court explained:

> The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." We note that, *in the past*, we have also looked to criminal penalties that could be imposed. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. *Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process*, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

State Farm, 538 U.S. at 428 (emphasis added; citations omitted).

A similar analysis should apply to unprecedented applications of "death penalty" civil sanctions that would require exercise of governmental discretion, generally proof of systemic misconduct, and finally exercise of judicial discretion as well. Respondents can cite no

example of such a draconian remedy being imposed in West Virginia for an isolated incident like this one, and the infrequency or paucity of such events should bear heavily on whether such sanctions truly provide the fair notice demanded by due process. If anything, one statute relied upon by Respondents, Code § 46A-7-111, strongly supports Quicken Loans' position. The per-violation *civil penalty* that the Attorney General can recover under that section is **$5,000** – a figure just a few hundred dollars more than the inflation-adjusted maximum private civil penalty under § 46A-5-101. Quicken Loans submits that this congruence is no accident: the Legislature has provided real guidance as to appropriate punishment for this species of consumer fraud.[6]

Other Constitutional Defects – Increasing Award After Successful Appeal. In response to Quicken Loans' argument that the Circuit Court's seven-figure increase in the punitive damages award was itself a violation of due process, Respondents merely cite a brief excerpt of discussion from the April 9 status conference,[7] in which Quicken Loans' counsel agreed with the Circuit Court that it was not bound by Judge Recht's earlier computation of punitive damages. Respondents' Br. at 29. Respondents apparently believe that this statement – which is of course accurate as a general principle of the law – is sufficient to refute Quicken Loans' argument on this point. It is not.

Quicken Loans' argument was plainly stated in its opening brief: a court cannot, consistently with due process, increase a punitive damages award on remand *where the only intervening event is a lawful, good-faith, and partially successful appeal.* Moreover, the Circuit Court aggravated its error by increasing the award based on its award of attorneys' fees and costs

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[6] And to reiterate – the Circuit Court disregarded this factor entirely, which necessarily renders its analysis incomplete and erroneous.

[7] The Circuit Court did not hear "argument" on April 9. The hearing was scheduled and held as a status conference, and the court was unprepared to hear argument on the merits at that time. Tr. (4/9/2013) at 1, 11 (A0000716, 726). Instead, the court suggested that a later hearing would be held after the court had reviewed the record. *Id.* at 34 (A0000749). None was.

to the Respondents on remand, where the remand was necessitated *solely* by the Circuit Court's own errors and addressed *solely* matters upon which Quicken Loans' appeal had been successful.

Consideration of Wealth. Quicken Loans fully acknowledges that the Circuit Court *stated* that it would not enhance the award because of Quicken Loan's wealth, but that statement then begs the question why the Court considered wealth *at all*. To the extent that Respondents rely on *Perrine v. E.I. du Pont de Nemours*, 225 W.Va. 482, 694 S.E.2d 815 (2010), Quicken Loans reiterates that classifying wealth as an "aggravating" factor cannot be squared with the plain holding of *State Farm*.

B. The "Remedies" Imposed on Remand Violate the Law and this Court's Mandates

In its Opinion, this Court forbade the cancellation of Respondents' debt, finding no support in the applicable statutes or otherwise in law or equity for such a "remedy." Instead, invoking equity's time-honored abhorrence of forfeitures, this Court made perfectly clear what equitable remedy, rather than cancellation, was permissible: "*This Court finds that a balancing of the equities requires that the parties be returned to the status quo as nearly as is possible.*" 737 S.E.2d at 662 (emphasis added; footnote omitted). Yet on remand, the Circuit Court again relieved Respondents of liability for their debt. The Circuit Court thereby ran afoul of both the law and this Court's mandate.

Respondents attempt to defend the Circuit Court's actions by seeking to limit the breadth of this Court's direction, positing that, for some reason, it ought not apply to the finding of unconscionability under Code § 46A-2-121. Resp. Br. at 38-39. They are wrong. This Court has already decided that 46A-2-121 must be read *in pari materia* with 46A-5-105, and the latter statute simply does not permit the cancellation of debts secured by a security interest.

Contrary to Respondents' assumption, there is nothing whatever inconsistent between this holding and other language in the Court's opinion that recognizes a circuit court's power to "refuse to enforce" an *agreement* under § 46A-2-121. Section 46A-5-105 refers to a *debt* – and a debt is merely one half of a credit *agreement*. To refuse to enforce an "agreement" is tantamount to a rescission, relieving *both* parties of their obligations. Thus, the Court's observation that the Circuit Court could refuse to enforce the agreement is perfectly consistent with its directive that the *status quo* be restored as nearly as possible.

As for the Circuit Court's novel "lien," it is illusory and all but worthless for the reasons Quicken Loans has already explained. QL Brief at 26. Moreover, nothing in the order suggests that it is even limited in the manner suggested by Respondents in their Brief at 40. In sum, § 46A-5-105 forbids cancellation of Respondents' "debt," and by rendering the Note unenforceable while permitting Respondents to retain the benefits of Quicken Loans' completed performance under that Note, the Circuit Court did precisely that.

In addition, the Circuit Court heaped another $98,800 award on top of the debt cancellation – yet another forfeiture, and one that placed the parties that much *further* away from the *status quo*. This Court must correct the Circuit Court's errors and redirect it to adhere to both the letter and spirit of this Court's mandate.

C. The Circuit Court Erroneously Refused to Offset its Award of Fees and Costs With the Proceeds of the Guida Settlement

Citing *dicta* in a single case, the Circuit Court decided that it was facing a question of first impression, and it refused to offset its massive award of fees and costs with *any* of Respondents' $700,000 recovery from their pretrial settlement with former defendants Guida and Appraisals Unlimited. Remand Op. at 18-21 (A0000908-911). The Circuit Court did so notwithstanding this Court's holdings that (i) fees and costs awarded under the Consumer

Protection Act are compensatory in character; (ii) Respondents suffered a single, indivisible injury; and (iii) Quicken Loans is entitled to an offset of all compensatory damages.

Respondents do not so much defend the Circuit Court's "reasoning" as attempt to substitute some other justification for the court's error. Their primary assertion is that Quicken Loans has somehow agreed to pay the fees, or should be estopped from asking for the offset. But this argument fundamentally misunderstands the way an offset functions. Guida's payment to Respondents is a *credit* to Quicken Loans for the liability that they share for Respondents indivisible injury. When Quicken Loans applies its credit to its liability for fees, it *is* "paying" those fees by consuming, dollar-for-dollar, an asset that is essentially a cash equivalent.

Next, Respondents argue that Quicken Loans has somehow lost its opportunity to use its offset because it took the position on the prior appeal that an award of fees should be considered punitive rather than compensatory. Indeed it did, but nowhere in any paper did Quicken Loans ever cede its right to an offset of whatever compensatory damages were eventually awarded against it.

And in that regard, it is more than ironic that Respondents would ask the Court to apply judicial estoppel to bar the offset. Proper application of that doctrine requires precisely the opposite ruling. Respondents argued on appeal that fees and costs are compensatory, and they prevailed. They must not now be heard to argue otherwise. *See Dep't of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 504, 618 S.E.2d 506, 513 (2005) ("Under the doctrine, a party is generally prevented from *prevailing* in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (emphasis added; quotation omitted). Their further suggestion that they were "prejudiced" because Quicken Loans argued as it did is nonsense – Respondents deliberately and successfully argued that fees were

compensatory for their own reasons (*i.e.* to jack up the punitive damages), and had Quicken Loans agreed with their position, Respondents would surely have welcomed the agreement.

Finally, this Court has already held that Respondents suffered a single, indivisible loss, which is the correct test under the law, and *not* whether Quicken Loans and Guida had a "joint obligation." Resp. Br. at 42.[8] Their attempts to now divide up their single injury are too late and erroneous in any event. Guida's appraisal was a *sine qua non* for this ill-fated transaction, and Guida's settlement and exit from the litigation simply left Quicken Loans in the lurch, facing liability for which the Guida appraisal was, is, and always will be a proximate and *essential* cause.

D. The Award of Additional Fees and Costs on Appeal was Error and Yet Another Violation of the Mandate

In attempting to defend the Circuit Court's award of over a quarter-million dollars in additional fees and costs (which then served as a basis for the colossal increase in punitive damages), Respondents studiously ignore Quicken Loans' primary argument, and they mischaracterize the other.

First and foremost, they ignore their *own* express request *to this Court* for an award of fees on appeal, which this Court implicitly rejected. The Circuit Court was without power to second-guess this Court's decision.

Second, Respondents point out unhelpfully that fees are not ordinary court "costs," as if Quicken Loans had so argued (and it had not). Quicken Loans' actual observation regarding court costs was that the *legal standard* for an award of costs and for an award of fees is

[8] For completeness' sake, Quicken Loans does note that Respondents are incorrect in asserting that Guida was not subject to an award of attorneys' fees under 46A-5-104. Although he was not a creditor, he was a seller of services and could have been guilty of unfair and deceptive practices under Article 6 of the Act. Indeed, the entire point of Article 6 is to provide consumer protections in non-credit situations.

precisely the same – *i.e.* whether the party substantially prevailed. Hence, the Court's direction that each party bear its own costs reflects this Court's view that *neither* party substantially prevailed.

III. Conclusion

The judgment of the Circuit Court of Ohio County must be reversed and remanded. This Court should (i) eliminate or vastly reduce the multi-million-dollar punitive damages award, (ii) permit Quicken Loans to have the full benefit of the $700,000 offset to which it is entitled, (iii) eliminate or sharply reduce the additional award of attorneys' fees on remand, (iv) require the Circuit Court to craft remedies that reflect Respondents' lack of actual damages and that restore the *status quo* as nearly as possible; and (v) otherwise direct the Circuit Court to strictly adhere to all mandates of this Court.

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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, counsel of record for Petitioner Quicken Loans Inc., hereby certify that the foregoing "Reply Brief of Petitioner Quicken Loans Inc." was served this 23rd day of December 2013, by placing a true and accurate copy thereof in the United States Mail, postage prepaid and addressed as follows:

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